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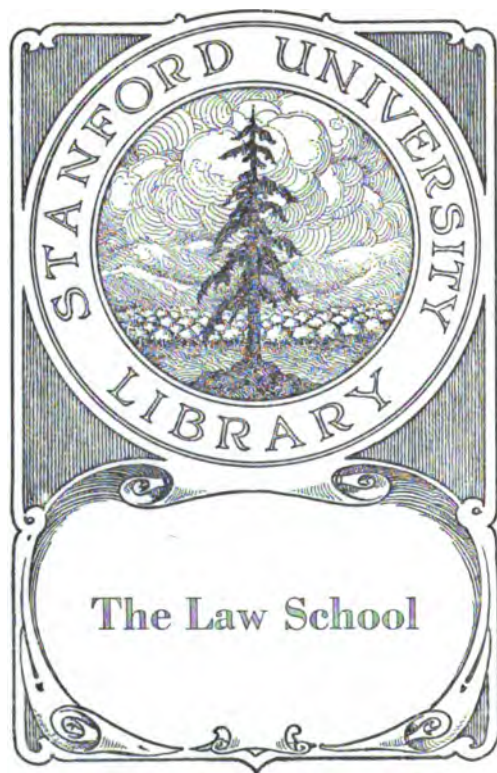
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BB
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THE
LAW OF PLEADING

IN
STANDARD FORM
CIVIL ACTIONS AND DEFENSES
UNDER THE CODE

ALSO PRACTICE IN

APPEAL AND ERROR

WITH

NUMEROUS FORMS AND PRECEDENTS

(WITH SPECIAL REFERENCE TO THE OHIO CODE)

BY
EDGAR B. KINKEAD
OF THE COLUMBUS, OHIO, BAR

(*SECOND EDITION*)

VOLUME II

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W. H. ANDERSON AND COMPANY
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LAW OF PLEADING.

CHAPTER 50.

INTERPLEADER.

Sec. 727. Interpleader — Nature and extent of the remedy.

728. Form of petition in interpleader.

Sec. 728a. Answer to obtain order interpleading and discharging defendant of payment into court.

Sec. 727. Interpleader — Nature and extent of the remedy.— A bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally and equitably the same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter.¹ The ground of jurisdiction is the apprehension of danger to the person seeking the remedy, from doubtful and conflicting claims, and the only relief to which he is entitled is to have liberty to pay the money to the persons entitled to it.² The code interpleader invokes neither the common-law nor chancery powers of the court by an original common-law or chancery action. The jurisdiction conferred on the court is purely statutory.³

In an action upon a contract, or for the recovery of personal property, a defendant therein may make an affidavit that a third party has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same as the court may direct. The court may then make an order for the safe-keeping or for the payment or deposit in court of the subject of the action, or the delivery thereof to such person as it may direct, and also an order requiring such third person to appear in a reasonable time and maintain or relinquish his claim against defendant. If such third party fails to appear, the court may then declare him barred of all claims

¹ *Sherman v. Partridge*, 1 Abb. Pr. Insurance Co. v. Insurance Co., 28 256; *Johnston v. Oliver*, 51 O. S. 620. Minn. 7.

² *Newhall v. Castins*, 70 Ill. 156; ³ *Bridge v. Martin*, 3 W. L. M. 204; *Cogswell v. Armstrong*, 77 Ill. 139; *Board v. Scoville*, 18 Kan. 17; O. Code, secs. 5016, 5017.

against the defendant. But if he appears, he may be allowed to make himself a defendant in lieu of the original defendant, who shall then be discharged from all liability upon compliance with the order of the court for the payment, deposit or delivery of the subject of the action.¹ An officer against whom an action is brought to recover personal property taken by him on execution, or the proceeds of such property sold by him, may have the benefit of this provision against the party in whose favor the execution issued.² In such a case the court may upon application of the defendant, or of the party in whose favor the execution or attachment issued, permit the latter to be substituted as defendant.³ Two claimants to a trust may be required to interplead, so as to enable the court to ascertain the beneficiary, without compelling either party to establish his legal right.⁴ A bailee may protect the interest of the real principal by an interpleader,⁵ and a corporation may maintain a bill of interpleader against opposing claimants to a dividend due on shares of stock.⁶ In an action by a corporation to cancel certificates of stock which have been wrongfully issued, all the holders thereof should be united so as to remove the cloud upon the title of the holders of the genuine certificates.⁷ In an action to enjoin the enforcement of a judgment by an assignee thereof, where it is claimed that there are several parties claiming the fund, the plaintiff should bring the fund necessary to pay the same into court, and make all claiming it parties, and call upon them to interplead.⁸ A defendant cannot take issue with the plaintiff, and at the same time have the benefit of an interpleader. The two are inconsistent, and he must elect between them.⁹ Actions of interpleader, it is said, ought not to be encouraged, and ought not to be brought except where there is no other way for the plaintiff to protect himself from a litigation in which he has no interest. To maintain the action it is necessary to show that the plaintiff has not acted in a par-

¹ O. Code, sec. 5016.⁷ *Railway Co. v. Bank*, 22 W. L. B.² O. Code, sec. 5017.

248.

³ O. Code, sec. 5018.⁸ *Liniman v. Dunnick*, 1 O. C. C.⁴ *Presbyterian Society v. Presbyte-*

568.

rian Society, 25 O. S. 128.⁹ *Johnson v. Oliver*, 51 O. S. 20;⁵ *McKay v. Draper*, 27 N. Y. 256.

81 W. L. B. 182.

⁶ *Mills v. Townsend*, 109 Mass. 115.

tisan manner as between the different claimants.¹ The party seeking relief must have incurred no independent liability to either claimant;² if he denies his liability for part of the claim of the contestants, his position is not one of indifference, and he can not avail himself of the remedy.³

If the interpleader does not pay the money into court he should be charged with interest up to the time of payment.⁴

Sec. 728. Form of petition in interpleader.—

Plaintiff is a corporation organized under the laws of the United States and carrying on a banking business at —.

That on the — day of —, 18—, a money deposit account, No. —, was opened with the said bank in the name of Cigar-makers' Union, "subject to the order of the president, financial secretary and treasurer, or any two of them," and a deposit book was given therefor, bearing the number of said account, in which debits and credits have been from time to time made, and there now stands to the credit of said account the sum of \$—.

That both T. C. and H. S. claim to be president, S. J. and E. L. R. to be financial secretary, and G. F. and T. M. D. to be treasurer of said Cigar-makers' Union.

That the said T. C., S. J. and G. F. have demanded and claim that the amount to the credit of said deposit account shall be paid to their order, or to the order of any two of them in their above-mentioned respective official capacities, and that the said H. S., E. L. R. and T. M. D. likewise have demanded and claim that the same shall be paid to their order, or the order of any two of them in their above-mentioned respective official capacities.

That plaintiff is unable to decide between the aforesaid conflicting claimants, and while ready and anxious to pay or hold the amount appearing on the books of plaintiff to the credit of said deposit account, to or for the use of the true owner or owners, plaintiff cannot safely make any payments on account thereof, or recognize either of said conflicting claims, until the questions involved therein are settled authoritatively by some court of competent jurisdiction.

That the said T. C., C. J. and G. F., in their aforesaid respective capacities of president, financial secretary and treasurer of said Cigar-makers' Union, by W. P. W., their attorney, have already instituted suit in the — court of —, in the state of Ohio, against plaintiff for the recovery of said deposits, and plaintiff is apprehensive of a like suit on the part of the aforesaid adverse claimants thereof.

¹ *Hinckley v. Pfister*, 88 Wis. 64, 85; par. 421; *Conly v. Ala. G. C. I. Co.*, Cook, S. & S., secs. 387, 407, 540, 544; 67 Ala. 472; *James v. Pritchard*, 7 M. McDonald v. Allen, 87 Wis. 108; & W. 216.

Buffalo G. S. Co. v. Alberger, 23 Hun, 849, 853. ³ *Cogswell v. Armstrong*, 77 Ill. 139; *Patterson v. Perry*, 14 How. Pr.

² *Adam's Eq.* 200; *Bispham's Eq.*, 505

⁴ *C. K. Hall Co. v. Lloyd Bros.*, etc., 14 O. C. C. 30.

That plaintiff has no claim or interest whatever in said deposits, and desires and tenders payment of the amount of the same into this court under this proceeding.

Wherefore the plaintiff prays that the said T. O., C. J. and G. F. on the one part, and the said H. S., E. L. R. and T. M. D. on the other part, may interplead and adjust their said several demands and claims between themselves, plaintiff being willing and desirous that the sum appearing on its books to the credit of the account above mentioned should be paid to such of the defendants as shall be entitled thereto.

That in the meantime the said T. O., C. J. and G. F., and the said H. S., E. L. R. and T. M. D., their counsel, solicitors, agents and attorneys, may be restrained by the order and injunction of this honorable court from prosecuting or commencing any action or actions at law against plaintiff for or in respect of the several matters aforesaid; and that plaintiff may have such other and further relief as his case may require.

[*Verification.*]

Sec. 728a. Answer to obtain order interpleading and discharging defendant on payment into court.—

Y. Z., by way of interpleader herein, upon his oath says:

That he is the defendant [*or, the president, or, cashier of the defendant*] above named [*or otherwise state relation to the cause, indicating means of knowledge*].

[*Here indicate cause of action on contract or for recovery of specific real or personal property.*]

That the claims of the plaintiff and of said — — have been made without collusion of this defendant with either of them; and that the defendant has no interest in the sum [*or, property*] claimed, except to pay [*or, deliver*] to the person rightfully entitled thereto; that he cannot safely determine to which of said claimants it should be paid [*or, delivered*], and is ready and willing to deposit the same [*or, to deliver the same as the court may direct*] upon being discharged from liability to either claimant [*and if discharge of a lien on defendant's property is involved, may add, as thus: and upon said mortgage being discharged of record*].

Wherefore this defendant asks an order requiring the parties to this action to show cause why he should not be permitted to deposit the said sum of money [*or, property*] with the clerk of this court, and that he be discharged from further liability herein.

NOTE.—R. S., sec. 5016.

CHAPTER 51.

INTOXICATING LIQUORS.

Sec. 729. Liability for causing intoxication.

730. Petition by widow for damages to her support.

Sec. 731. Petition by person intoxicated against liquor seller.

Sec. 729. Liability for causing intoxication.—A statutory liability is imposed upon one who causes the intoxication of another, by compelling him to pay a reasonable compensation to any one who may take charge of or provide for such intoxicated person, and authorizes a recovery therefor in a civil action.¹ A husband, wife, child, parent, guardian, or other person liable to be so injured thereby, upon giving notice as provided by statute to a person so furnishing liquors, or to the owner or lessors of the premises where the same are sold,² may maintain an action severally or jointly against any person or persons who have caused such intoxication in whole or in part; and the owner of the premises who rents the same with knowledge that the liquors are to be sold, or who knowingly permits the sale of liquor therein, which causes the intoxication of any person, is severally or jointly liable with the person selling the same for actual damages resulting from such sale, as well as for exemplary damages.³ And any person who rents or leases premises to another to be used and occupied for the purpose of selling intoxicating liquors may be held responsible for all damages assessed against any person occupying the same. This does not apply, however, to an owner who rents or leases his premises without knowledge that the same are to be used for the sale of liquor.⁴ Nor is an owner of premises who rents the same with a distinct understanding that liquor is not to be sold, liable when sold without his

¹ R. S., sec. 4356.

² R. S., sec. 4358.

³ R. S., sec. 4357. Contractors may sue person furnishing liquor to their

employees. *Duroy v. Blinn*, 11 O. S. 331.

⁴ *Zink v. Grant*, 25 O. S. 353.

knowledge.¹ An action may be maintained against a person who owns merely a life estate, but leases the same for the sale of intoxicating liquors, and the damages may be enforced against such life estate.² But the estate in remainder cannot be held.³ Where the place is described as a room, and the proof shows that liquor was sold in a cellar or grocery, it is not a variance.⁴

In an action by a wife for an injury to her means of support, it is not necessary to show that she has been at any time, in whole or in part, without means of support.⁵ The liability is not confined to injury resulting from drunkenness merely, but extends to cases where it results in insanity, sickness or inability caused by such intoxication.⁶ In Ohio and other states the doctrine is clearly laid down that under the liquor laws no recovery can be had for damages resulting in death as a necessary result from the sale of intoxicating liquors.⁷ Under similar statutes other courts hold that damages to the support of any one resulting from death caused incidentally or otherwise by intoxication may be recovered.⁸ The liquor-dealer may be liable to exemplary damages in an action by the widow of the person losing his life.⁹ It has also been held that a right of action for injury to means of support may be maintained by a child born after the father's

¹ O'Rourke v. DeGraw, 21 N. Y. S. 1118 (1893). injured. Shugart v. Egan, 88 Ill. 56. Or is run over by a train of cars while intoxicated. Collier v. Early, 54 Ind. 559. See Backes v. Dant, 55 Ind. 181; Brookmire v. Monaghan, 15 Hun, 16; Hayes v. Phelan, 4 Hun, 733; King v. Henkie, 80 Ala. 505; Hackett v. Smelsley, 77 Ill. 109. See Tiffany's Death by Wrongful Act, sec. 78.

² Mullen v. Peck, 49 O. S. 447.

³ Mullen v. Peck, *supra*.

⁴ O'Keefe v. State, 24 O. S. 175.

⁵ Mulford v. Clewell, 21 O. S. 191 (1871). See Schneider v. Hosier, 21 O. S. 98; Sibila v. Bahney, 34 O. S. 899. Sales made after the commencement of the action may be shown. Bean v. Green, 38 O. S. 444.

⁶ Mulford v. Clewell, *supra*; Stone v. Dickman, 5 Allen, 29; Shearman & Redfield on Neg., secs. 27 and 46.

⁷ Kirchner v. Meyers, 35 O. S. 85; Davis v. Justice, 31 O. S. 359. Recovery can be had only for the time the intoxication lasts. Krach v. Heilman, 58 Ind. 518. No liability where person intoxicated is assaulted and

⁸ Eddy v. Courtright, 91 Mich. 264; Quinlen v. Welch, 28 N. Y. S. 963; Rafferty v. Buckman, 46 Ia. 195; Jackson v. Brookins, 5 Hun, 530; Quain v. Russell, 8 Hun, 819; Barrett v. Dolan, 130 Mass. 366.

⁹ Kennedy v. Sullivan, 136 Ill. 94. See Davis v. McKnight, 146 Pa. St. 610.

death which resulted from intoxication.¹ Nor is it essential that a defendant shall have been the sole cause of such intoxication. Any one who contributes to cause the same by his illegal sales is liable.² Where separate actions are brought by a wife for injury to her means of support against different persons, the fact that one of them has been compromised and settled is no defense to the other.³ And the fact that the husband drank to excess will not defeat a recovery, although it may be taken into consideration upon the question of damages.⁴ The statute has also been held to include the mother of an adult son, with whom she lived and who voluntarily supported her.⁵ It is not necessary that the illegal sales be proved beyond a reasonable doubt.⁶

Sec. 730. Petition by wife for injury to her support.—

Plaintiff states that she is the wife of A. B. and entirely dependent upon him for support. That her said husband, when sober and free from the influence of intoxicating liquor, is a diligent and careful worker, being engaged in the business of [*state what*], and is capable of earning at said business the sum of \$—— per month. That her said husband is addicted to the habit of intoxication [*state extent of*], and when he once becomes intoxicated continues in that condition for a considerable length of time, which fact was well known to the defendant.

That the defendant C. D. is and has been for [*state approximately*] engaged in the sale of intoxicating liquors at No. ——, M. street, in the city of ——, and is well acquainted with plaintiff's husband and his said habits in respect to intoxication.

That on or about ——, 18——, said defendant sold to plaintiff's husband intoxicating liquors, by reason whereof he became intoxicated, thereby reviving his said habit, and that he has continually since said date been in the habit of becoming intoxicated upon liquors sold him by the said defendant.

That plaintiff did on the —— day of ——, 18——, give notice to said defendant not to sell her said husband intoxicating liquors, but that said defendant wholly disregarded said notice, and continued at numerous times to sell her husband intoxicating liquors from the date of said notice until the commencement of this action, wholly disregarding said notice, and with full knowledge of the habits of her husband.*

¹ Quinlen v. Welch, 28 N. Y. S. 963.

² Miller v. Patterson, 31 O. S. 419.

³ Boyd v. Watt, 27 O. S. 259; Rautz v. Barnes, 40 O. S. 48; Bryant v. Tidgewell, 133 Mass. 86; Edwards v.

⁴ Uldrick v. Gilmore, 35 Neb. 288.

⁵ Eddy v. Courtright, 91 Mich. 264.

Woodberry, 156 Mass. 21.

⁶ Lyon v. Fleahmann, 34 O. S. 151.

That by reason of the sale of such intoxicating liquor by defendant to her husband the latter has been since —, 18—, to the present time, almost continuously intoxicated, wholly neglecting his business, squandering his money, and failing to provide plaintiff with the necessary food, etc. [*state any special damages resulting*].

[*Prayer for damages.*]

NOTE.— See *ante*, sec. 729. As to notice, see R. S., secs. 4359, 4360. The notice need not be recorded by township clerks. The substance only is sufficient. *Bankhardt v. Freeborn*, 43 O. S. 52.

Sec. 731. Petition against owner of premises where liquor sold.—

[*Continues from * in preceding form, sec. 730.*] The defendant J. H. is the owner in fee of the premises located and situated at No. —, M. street, in the city of —, and of the building situate thereon, in which the said C. D. is engaged in the sale of intoxicating liquors. That defendant J. H. leased said building to said C. D. with full knowledge that the said C. D. expected to engage in the business of the sale of intoxicating liquors therein, and that said defendant J. H. has had knowledge that said C. D. has so been using and occupying said building for the sale of intoxicating liquors therein. [*Set out special damages, and prayer for judgment.*]

CHAPTER 52.

JUDGMENTS.

Sec. 732. Action on a judgment.

733. Petition on judgment.

734. Petition on foreign judgment.

Sec. 735. What defenses may be made to action on judgment.

Sec. 732. Action on a judgment.—That an action will lie under the code upon a judgment at law for money, whether domestic or foreign, is well settled.¹ The same is true of decrees in chancery for the payment of money.² A domestic lien becomes a lien as soon as pronounced, while a foreign judgment is merely *prima facie* evidence of indebtedness.³ The fact that a judgment rendered by a justice may be enforced by execution will not bar an action thereon;⁴ the action may be brought even though an execution which has been issued has not been returned.⁵ After judgment the law implies a promise on the part of the judgment debtor to pay it, and in an action thereon plaintiff is entitled to such remedies as are authorized in actions upon contracts, whether it be a foreign or domestic judgment.⁶ That an action of debt will lie upon judgments at law for money, whether domestic or foreign, seems to be well supported,⁷ though the supreme court of Ohio has refused to consider a domestic judgment a specialty or contract within the meaning of the statutes of limitation,⁸ but holds a foreign judgment to be a contract.⁹ So far

¹ Healy v. Roby, 6 O. 521; Tyler v. Winslow, 15 O. S. 364; Church v. Cole, 1 Hill, 645; Moore v. Ogden, 35 O. S. 433; Goodin v. McArthur, 4 W. L. R. 215.

² Moore v. Adie, 18 O. 430; Moore v. Stark, 1 O. S. 374.

³ Pelton v. Platner, 13 O. 209; Dunbar v. Hollowell, 34 Ill. 163.

⁴ Brooks v. Todd, 1 Handy, 169; Fox v. Burns, 2 W. L. M. 387; Goodin v. McArthur, 4 W. L. R. 215.

⁵ Linton v. Hurley, 114 Mass. 76.

⁶ Gutta Percha Mfg. Co. v. Mayor, 106 N. Y. 276.

⁷ Moore v. Ogden, 35 O. S. 433-4; Haly v. Roby, 6 O. 521; Tyler v. Winslow, 15 O. S. 364; Church v. Cole, 1 Hill, 645; Clark v. Goodwin, 14 Mass. 286.

⁸ Tyler v. Winslow, 15 O. S. 364.

⁹ Stockwell v. Coleman, 10 O. S. 33.

as the latter class of judgments are concerned, it has been held that in actions thereon the substantial allegation of an action in debt may be made, as they possess no higher character than simple contract debts.¹ And it is generally conceded that the petition should state the court, the term when rendered, the parties and amount of the judgment, attaching a copy of the transcript thereto, the same being an evidence of indebtedness, though not for the purpose of supplying averments.²

The weight of authority seems to hold it unnecessary to aver jurisdiction in case of a foreign judgment.³ This must be restricted to courts of general jurisdiction,⁴ as the facts giving a court of inferior jurisdiction cognizance over the subject-matter involved should be set forth.⁵ As intimated, the doctrine is maintained in some jurisdictions that the petition on a foreign judgment should show jurisdiction in the court rendering the same;⁶ and indeed this seems the better rule, and more in harmony with other principles that statutes of foreign or sister states should be pleaded as well as the construction placed upon them. And it does not seem reasonable that a court should take judicial notice of the jurisdiction of a court rendering a foreign judgment.⁷ The judgment may be set forth according to its legal effect,⁸ and it will be sufficient to state that the debt remains unpaid and is full force, without alleging that it was not appealed from.⁹ In an action on a domestic judgment it will be sufficient to allege that it was duly rendered and that the defendant is indebted to the plaintiff;¹⁰ it is not necessary to allege jurisdiction or personal service.¹¹ It is provided by the code, which is considered ap-

¹ *Memphis Med. Coll. v. Newton*, 1 Handy, 168; *Bank v. Ramsey*, 26 Atl. Rep. 887 (N. J., 1898); *Black on Judgments*, sec. 850.

² *Dougherty v. Longmore*, 2 C. S. C. R. 134; *Burns v. Simpson*, 9 Kan. 658; *Anderson v. Flack*, 88 Ala. 294; *Mount v. Scholes*, 120 Ill. 394.

³ *Boone's Pldg.*, sec. 165; *Scanlan v. Murphy*, 53 N. W. Rep. 799 (Minn., 1892).

⁴ *Butcher v. Bank*, 2 Kan. 70; *Dodge v. Coffin*, 15 Kan. 277.

⁵ *Harmon v. Horse & Cattle Co.*, 9 Mont. 243.

⁶ *Grant v. Bledsoe*, 20 Tex. 456; *McLaughlin v. Nichols*, 13 Abb. Pr. 244.

⁷ See *Boone's Pldg.* sec. 160.

⁸ *Bank v. Veasey*, 14 Ark. 671.

⁹ *Choquette v. Artet*, 60 Cal. 594.

¹⁰ *Wehrman v. Reabirt* 2 C. S. C. R. 29.

¹¹ *Burnes v. Simpson*, 9 Kan. 658; *Spaulding v. Baldwin*, 31 Ind. 376.

plicable only to judgments of inferior tribunals, that in pleading a judgment, or other determination of a court, it shall be sufficient to state that such judgment was duly given or made; and if controverted, the party pleading must establish on the trial facts conferring jurisdiction.¹

Sec. 733. Petition on judgment.—

On the — day of —, 18—, at the — term of the court of common pleas of — county, Ohio, plaintiff recovered a judgment against the said defendant, in cause No. —, entitled —, plaintiff, and —, defendant, for the sum of \$—, etc.

That said judgment is wholly unpaid and is still a valid and subsisting judgment against said defendant, and there is due thereon from said defendant the sum of \$—, etc.

[*Prayer.*]

[*Attach copy of transcript.*]

Sec. 734. Petition on foreign judgment.—

On the — day of —, 18—, at the — term of —, 18—, of the court of —, in the county of — and state of —, to wit, on the — day of —, 18—, in an action there pending wherein plaintiff herein was plaintiff and defendant herein was defendant, plaintiff recovered a judgment against said defendant in the sum of \$—. (A copy of the transcript of the said judgment is filed herewith as an exhibit.)

That by the laws of said state of — said — court of — is a court of general jurisdiction, having cognizance over [*state the subject-matter of judgment*], and said court, at the time of the rendition of the aforesaid judgment against said defendant, had acquired jurisdiction over him by personal service.

That said judgment is wholly unpaid and is still a valid and subsisting judgment against said defendant, and there is due thereon from said defendant the sum of \$—.

[*Prayer.*]

Sec. 735. What defenses may be made to action on judgments.—To pronounce a valid judgment the court must have jurisdiction of the person and subject-matter.² A judgment rendered without jurisdiction is a nullity and may be disregarded whenever and wherever it may be met.³ Hence it follows that the jurisdiction may be inquired into whenever a judgment is made the foundation of an action either in the state or in any other state.⁴

¹ O. Code, sec. 5090, p. 129.

² Moore v. Starks, 1 O. S. 36.

³ Pennywit v Foote, 27 O. S. 600.

⁴ Spier v. Corll, 33 O. S. 236; Pennywit v. Foote, 27 O. S. 600.

A judgment is conclusive of the matters therein adjudged, but only as to those allegations which are material and traversable.¹ After the power of the courts has been invoked and judgment been pronounced it should have full force and effect, and not be open to question save for the best of reasons.

When jurisdiction has been properly obtained over the subject-matter of a cause, by a court competent to exercise it, its judgment, however erroneous, can not be questioned in a collateral proceeding.²

It is an established rule that the finding of a court of general jurisdiction, upon a subject-matter properly before it, shall not be collaterally impeached.³

A presumption is indulged in favor of such a court upon collateral attack that it acted correctly and with authority; and its judgment will be valid as though every act necessary to its jurisdiction affirmatively appeared.⁴

The Supreme Court of Ohio has, in a recent decision, in the opinion of many, made an inroad upon the rule as to collateral impeachment of judgments, though the court in pronouncing the decision disclaims the idea that it was a collateral attack, but that it was a direct attack upon the jurisdiction of the court. The author considers it unfortunate that the court does not review all of the Ohio decisions and distinguish them from the standpoint of the court in making the ruling. The ruling is as follows: "In an action on a personal judgment, whether rendered in this state or elsewhere, it is competent to plead and prove in defense, though it be in contradiction of the record, that the defendant was not served with process, nor jurisdiction of his person otherwise obtained by the court rendering the judgment. Such a defense is not within the rule which forbids

¹ Wixson v. Devine, 67 Cal. 341. common pleas being a court of su-

² Fowler v. Whiteman, 2 O. S. 270, perior jurisdiction, its records im-
286; Spoors v. Coen, 44 O. S. 497; port absolute verity. Johnson v.
Chapman v. Bolten Steel Co., 4 O. State, 42 O. S. 207. Evidence *dehors*
C. C. 245. the record is inadmissible, 40 O. S.

³ Fowler v. Whiteman, 2 O. S. 95. The decision of the probate
270, 286. court that service has been properly

⁴ Freeman on Judgments, sec. made can not be collaterally in-
124, p. 210, note 2; Reynolds v. Stan- quired into. Railroad Co. v. Belle
bury, 20 Ohio, 344; Adams v. Jeff- Centre, 48 O. S. 273; Newman v.
ries, 12 Ohio, 253. The court of City, 18 O. 323, 330.

the collateral impeachment of judgments, but is in the nature of a direct attack upon the judgment."¹

While great solemnity should surround judgments, and iron-clad rules should protect them from attack, yet it would seem to be a just rule that would allow an attack on a judgment the record of which contains false statements as to jurisdictional facts.

If there are two defendants, one may set up want of jurisdiction over his co-defendant.²

Parties to a judgment can not themselves collaterally impeach it on the ground that it was obtained through fraud.³

It is a good defense to a foreign judgment that it was obtained by fraud,⁴ or want of personal service,⁵ or, in fact, any defense may be made which would be available where the judgment was rendered.⁶

A judgment rendered in an action is not conclusive on the parties in subsequent litigation, unless they were adversary parties in the former suit.⁷ A general denial will raise the issue of the rendition of the judgment, the jurisdiction of the court as to the parties and subject-matter.⁸ An answer setting up *nul tiel* record raises only the question of the existence of the record.⁹ An answer that the plaintiff had no valid judgment is not a denial.¹⁰

¹ Kingsborough v. Tousley, 56 O. S. 450. The question in Railroad Co. v. Belle Centre, 48 O. S. 273, (opinion by same judge as 56 O. S. 450) was whether the service had actually been made, the defendant claiming that it was not legally served by publication; that being a resident corporation, personal service might have been had. In the 56 O. S. 450, the defendant was a non-resident, and claimed that he was not served.

² Mackay v. Gordon, 34 N. J. L. 286.

³ Freeman on Judgment, sec. 334.

⁴ Dobson v. Pearce, 12 N. Y. 156; Ward v. Quinlin, 57 Mo. 425.

⁵ Marx v. Fore, 51 Mo. 69.

⁶ Rogers v. Gwinn, 21 Ia. 58.

⁷ Koelsch v. Mixer, 52 O. S. 207.

⁸ Railway Co. v. McCarty, 8 Kan. 125.

⁹ Goodrich v. Jenkins, 6 O. 44.

¹⁰ Gibbon v. Dougherty, 10 O. S. 365.

CHAPTER 53.

LANDLORD AND TENANT.

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| <p>Sec. 736. Action for injury — The petition.</p> <p>737. Petition by tenant against landlord for injury caused by negligence in failing to provide fire-escapes.</p> <p>738. Petition by tenant against landlord for injury from defective sidewalk.</p> <p>739. Action for use and occupation — The petition.</p> <p>740. Petition for recovery of rent under a lease.</p> <p>741. Petition to recover rent under lease, to declare the same a lien on the leasehold, and for a sale thereof.</p> <p>742. Petition for breach of covenant for quiet enjoyment.</p> | <p>Sec. 743. Petition for assignee of lessor against assignee of lessee on covenant to insure.</p> <p>744. General form of petition for breach of covenants — For non-repair, etc.</p> <p>745. Petition for waste committed by lessee.</p> <p>746. Use and occupation — Defenses.</p> <p>747. Answer of surrender of lease.</p> <p>748. Answer of eviction of tenant by third person.</p> <p>749. Answer of loss of building by fire — Covenant to rebuild.</p> <p>750. Answer of loss by fire without covenant to rebuild.</p> <p>751. Answer of eviction by law as a defense in an action for rent.</p> |
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Sec. 736. Action for injury — The petition.— The general rule is that the tenant and not the owner of the premises is liable for injuries caused by a failure to keep the same in repair. If they become unsafe, it is the duty of the tenant to place them in proper condition;¹ but where the premises are rented with a nuisance upon them, the owner is liable.² Owners of property not occupying the same cannot complain of a nuisance created upon it, unless they suffer special damages, except as it may cause the diminution of the rents.³ Where

¹ *Burdick v. Cheadle*, 26 O. S. 397; 272; *Denver v. Solomon*, 81 Pac. Rep. Shindlebeck v. Moon, 32 O. S. 264; 507 (Col., 1892).

Burns v. Lockett, 8 W. L. B. 517; ² *Denver v. Solomon*, *supra*.

Williams v. McCready, 2 W. L. B. ³ *Dieringer v. Wehrman*, 12 W. L. B.

an owner of a building in which is operated an elevator leases the portion of the same containing the elevator, the lessee agreeing to keep the same in good repair and use, the owner is not liable for an accident arising from failure to keep the elevator in repair where it is operated exclusively by the lessee.¹ But where a landlord has retained any portion of the premises under his control, he must keep the same in repair and free from danger, and is not excused from liability for an injury to a tenant on the ground that its condition was caused by an independent contractor.² And where an owner of land rents a store-room in which he places fixtures in an unsafe manner and rents them to another, he is liable to a third person who is injured by the falling of such fixtures.³ A tenant who sustains an injury by reason of the failure of the landlord to comply with a law requiring fire-escapes to be placed upon the building may maintain a civil action in damages therefor against the owner.⁴ A tenant whose term has expired, but who leaves certain property in a building by consent of the lessor, does not have such possession as will make him liable for an injury which occurs from not maintaining it in a safe condition.⁵ A landlord is liable for an injury to a person to whom he rents his premises caused by an obstruction placed on a sidewalk in such a manner as to render the same unsafe.⁶ A landlord is also liable for an injury caused by the bad condition of a stairway.⁷

Sec. 737. Petition by tenant against landlord for injury caused by negligence in failing to provide fire-escapes.—

[*Caption.*]

At all times hereinafter mentioned defendant was the owner and in possession and control of a building located at number — on O. street, in the city of C., and state of Ohio, which said building was four stories high, the three upper

222; Worcester v. Manufacturing Co., 41 Me. 159; Francis v. Schrockhoff, 53 N. Y. 155; Jutte v. Hughes, 67 N. Y. 267.

¹ Sinton v. Butler, 40 O. S. 158.

² Dorse v. Fisher, 19 W. L. B. 106. See Taylor on L. & T. 175a; Watkins v. Goodall, 188 Mass. 533; Looney v. McLean, 129 Mass. 83. Cf. Purcell v. English, 86 Ind. 84.

³ Burdick v. Cheadle, 26 O. S. 898. See McNeal v. Emery, 8 W. L. B. 265.

⁴ Rose v. King, 49 O. S. 213; R. S., secs. 2573-84.

⁵ Franke v. St. Louis, 110 Mo. 516.

⁶ Bruner v. Cumming, 133 Ind. 433; 32 N. E. Rep. 732 (1892).

⁷ Walton v. Kane, 28 N. Y. S. 1029.

stories of which were used as a tenement house. By reason of the premises it became and was at all times the duty of said defendant to provide a convenient exit or fire-escape from the different upper stories of said building, which should be easily accessible in case of fire. Yet said defendant did not, and had not at any of the times hereinafter mentioned, performed his duty in any respect whatever, and did not provide any convenient exit or fire-escape from any of said upper stories of said building forming a tenement house as aforesaid; nor did he provide any exits or fire-escapes from any of said upper stories which were easily accessible, or accessible at all to this plaintiff in case of fire.

From about the — day of —, 18—, until after the events hereinafter mentioned, this plaintiff rented from defendant three rooms in the rear of said building, on the second story of said building, being part of said tenement house, and he was in possession and occupancy of said rooms and of said part of said tenement house on the — day of —, 18—. In the night of the day last aforesaid, said building caught fire in the lower or ground story of said building in a dry goods store, and soon thereafter communicated with a pork store in said defendant's said building, which was particularly inflammable, owing to the character of business there carried on. Said pork store was carried on by — —, of which defendant was then, and for a long time previously had been, president and chief stockholder. Plaintiff was in bed when the alarm of fire was given, and to escape from said building he was forced to jump from one of said rear windows into an alley which ran along the rear of said building, and in so doing suffered the injuries hereafter mentioned. The fire in said lower store rendered the passage leading to said stairs and front of the building impassable, and the said stairs and the front windows of said building inaccessible to those in the rear of said building. Had there been fire-escapes at any of said rear windows, as under the statute in such cases made and provided, and owing to the construction and dangers of said building, there should have been, or had defendant provided said tenement house with convenient exits, easily accessible in case of fire, plaintiff would not have been compelled to escape in the way he did, nor have suffered the injuries hereinafter mentioned. In jumping from said window plaintiff struck on his right side, breaking his right arm at the wrist-joint into a number of fragments [*state nature of injury and special damages*]. While seeking to escape plaintiff inhaled so much hot, damp smoke as to seriously injure his lungs, causing a large abscess therein, etc. Said injuries to the ankle, lungs and spine are permanent in their nature, and will enfeeble and sicken plaintiff as long as he lives. Plaintiff exercised all due and proper care in about said premises, and he

received said injuries wholly by the carelessness, negligence and breach of duty of defendant aforesaid [and not through any carelessness or negligence of his own]. Plaintiff has therefore, by reason of the premises and by force of the statute in such case made and provided, been damaged by defendant in the sum of \$——, for which sum he asks judgment.

M., N. & W., Attorneys.

NOTE.—From *Rose v. King*, 49 O. S. 218. R. S., sec. 2578, makes it the duty of the owner of a tenement house to provide fire-escapes. Nor is this duty confined to buildings within municipalities. 49 O. S. 218. A tenant injured by reason of failure of the landlord to provide fire-escapes may maintain a civil action in damages. *Id.*

Sec. 738. Petition by tenant against landlord for injury from defective sidewalk.—

[*Caption, etc.*]

Defendant is the owner of the following described premises, situate in ——, ——, to wit: [*Description.*]

Plaintiff did on the —— day of ——, 18——, rent said premises from the defendant and is now his tenant. That said tenancy is by the month, renewable monthly, and as a part of said contract said defendant agreed to keep the said premises, including the walk hereinafter mentioned, in good condition and repair.

Plaintiff says the plank walk on said premises was rotten and defective, and that it was necessary for her, in the proper use of said premises, to use said walk daily. That on the —— day of ——, 18——, before entering upon a new month on said premises, she notified the defendants of the bad and dangerous condition of said walk, and again on the —— day of ——, 18——. That at said time she notified them that she would leave said premises unless said walk was repaired. That thereupon said defendants promised at each time to fix said walk, and, relying on said promises and upon the contract made by said defendant as to repairs, plaintiff renewed her letting, and by reason thereof was induced to remain. But that the defendant, disregarding said promises and neglecting his duty, failed to repair the said walk until after the —— day of ——, 18——, on which day plaintiff had occasion to use said walk in her daily duties. And in so using the same in a careful manner, her foot slipped into a hole in said walk and her ankle was broken. Plaintiff says that No. ——, —— Ave., is one of a row of houses belonging to the defendants, and that the walk complained of is a walk in the rear of said row, and is a common walk for the common use and benefit of all the occupants of said row, tenants of the defendants, being a common highway for all said tenants as well as for the plaintiff, and not under the control of the plaintiff. That said walk made by the defendants was by virtue of the contract afore-

said under their care and control on the — day of —, 18—, on which plaintiff was injured. Plaintiff says that she is a lace-cleaner by trade, that she has dependent upon her own exertions a large family, and that by reason of said accident she has been prevented from following her trade and has suffered severe bodily pain and has been to a large expense by reason of said accident, and that she has been damaged in the sum of \$—. Wherefore plaintiff prays judgment against the defendants in said sum of \$— by reason of the facts above set forth.

NOTE.— Adapted from *Emery v. Dee*, error to the superior court of Cincinnati, Ohio, No. 1543; superior court affirmed by supreme court, March 8, 1893, in which it was held by the superior court (18 W. L. B. 349) that in the absence of a contract the landlord is not bound to keep the walk in repair. The form, however, is changed to conform to the decision. See *Watkins v. Goodall*, 188 Mass. 533. If, however, the premises were a nuisance at the time of letting, recovery could be had. *McNeal v. Emery*, 8 W. L. B. 265.

Sec. 739. Action for use and occupation — The petition. Several tenants in common who unite in renting property may join in one action for the recovery of rent.¹ It is not necessary to make a demand for rent when the lease provides that mere non-payment will determine the same.² It is held that the action will lie only where a tenancy is established;³ and will not lie after ejectment.⁴ In New York it is held unnecessary to aver or show how the relation of landlord and tenant arose between the parties.⁵ It will not lie at the suit of a purchaser of mortgaged premises sold under a decree against a tenant in possession under the mortgagor;⁶ nor can it be maintained where possession is held adversely under a claim of title, where no contract, express or implied, is shown;⁷ or where the circumstances of the case rebut a promise to pay rent.⁸ A grantee of a reversion cannot maintain the action in his own name against a lessee upon an express covenant contained in the lease for the payment of rent.⁹ The action can be prosecuted in any county other than that where the land lies.¹⁰ A lessor may maintain an action for rent against his lessee on an express covenant to pay rent during the term of his leasehold, even though the latter has

¹ *Cahoon v. Kinen*, 42 O. S. 190.

² *Cincinnati v. Wall*, 1 O. S. 222.

³ *Sweeney v. Garrett*, 2 Disn. 601;
City v. Fitzgerald, 2 C. S. C. R. 61.

⁴ *Heidelberg v. Slader*, 1 Handy, 457; *Mitchell v. Pendleton*, 21 O. S. 664; *Despard v. Wallbridge*, 15 N. Y.

⁵ *Richey v. Hinde*, 6 O. 371.

374; *Moore v. Harvey*, 50 Vt. 297.

⁶ *Butler v. Cowles*, 4 O. 205.

⁷ *Waters v. Clark*, 23 How. Pr. 104.

⁸ *Crawford v. Chapman*, 17 O. 449.

⁹ *Peters v. Elkins*, 14 O. 344.

¹⁰ *Genin v. Grier*, 10 O. 210.

assigned all his interest and the lessor has accepted rent from the assignee of the term.¹ Where a tenant holds over after the expiration of his term the landlord may treat him as a trespasser or a tenant for another year upon the terms of the prior lease;² and where the tenure is uncertain the amount recoverable is the fair rental value.³ The plaintiff need not set forth an implied demise, but may declare for use and occupation and recover on the special facts shown.⁴ Where rent is payable in monthly instalments, an action for each instalment may be maintained as it becomes due.⁵

Sec. 740. Petition for recovery of rent under a lease.—

Plaintiff is the owner in fee-simple of the following described premises situate in the city of —, etc.: [*Description.*]

On the — day of —, 18—, plaintiff leased said premises to the defendant C. D., for the term of — years, beginning on the — day of —, 18—, and ending on the — day of —, 18—, at a yearly rental of \$—, to be paid on the — day of —, 18—.

Defendant took possession of said premises in accordance with the terms of said lease on the — day of —, 18—, and has continuously occupied the same since said date, etc., but has not paid the rent for —, 18— [*state time*], amounting to the sum of \$—.

There is due from the said defendant to plaintiff the said sum of \$— for rent aforesaid, for which he asks judgment.

[*Attach copy of lease as exhibit under sec. 5085; ante, sec. 57.*]

NOTE.—See also form in *Cahoon v. Kinen*, 42 O. S. 190. If a person is occupying premises in such a manner that a contract to pay rent cannot be implied, rent cannot, in the absence of an express contract, be recovered. *Mitchell v. Pendleton*, 21 O. S. 664. See 15 N. Y. 181; 50 Vt. 297. If there be a void contract to purchase, the person occupying the premises will be liable for rent. *Mattox v. Hightshue*, 39 Ind. 95. The giving of a note by lessee to lessor is not payment of rent. *Sutliff v. Atwood*, 15 O. S. 186.

Sec. 741. Petition to recover rent under lease, to declare the same a lien on the leasehold, and for a sale thereof.—

On the — day of —, 18—, plaintiff duly executed and delivered to said defendant S. A. F. a lease for a term of — years, from the — day of —, 18—, to the — day of —

¹ *Taylor v. De Bus*, 81 O. S. 468; even though the premises have been *Sutliff v. Atwood*, 15 O. S. 186; held under a void lease. *Wilson v. Smith v. Harrison*, 42 O. S. 180; *Lodge Trustees*, 8 O. 174.

v. White, 30 O. S. 569. The action ² *Wheeler v. Crouse*, 1 O. C. C. 284.

cannot be sustained against the per- ³ *Cahoon v. Kinen*, 42 O. S. 190.

son to whom assigned. *Fulton v.* ⁴ *Morris v. Niles*, 12 Abb. Pr. 108;

Stuart, 2 O. 216; *Jones v. Smith*, 14 *Pierce v. Pierce*, 25 Barb. 248.

O. 606. The action may be sustained ⁵ *Fox v. Althorp*, 40 O. S. 823.

—, 18—, for the following described real estate situate in — county, Ohio, to wit: [*Description of premises.*]

Plaintiff further says that the rent reserved in said lease and which said defendant S. A. F. in and by said lease agreed to pay to said plaintiff was and is \$— per annum, payable quarterly on the first days of June, September, December and March in each year during said term, being the sum of — dollars each quarter. And said defendant, in addition to the payment of said rent, also agreed and promised to pay all taxes and assessments on said premises during said term; that the said defendant entered into possession of said above-described real estate under said lease at the date thereof, and has ever since held possession thereof, and thereby became indebted to and liable and bound to pay said plaintiff the several instalments of rent falling due, as follows: [*Copy instalments due.*]

Plaintiff says that under and according to the terms of said lease said rent is a lien on said leasehold estate and all the interest of said defendants therein. A copy of said lease is hereto attached, marked "Exhibit A."

And plaintiff further says that in and by said lease said defendant had and has the privilege of purchasing the fee of said premises at any time during said term for the sum of \$— after payment of all rents and taxes then due.

Plaintiff further says that said defendant S. A. F. failed and neglected to pay said ground rent or any part thereof, and each and all of said instalments of ground rent are due and unpaid with interest on each instalment from the date of its maturity; and said defendant wholly neglected to pay the taxes on said lots as required by said lease.

There is due plaintiff from said S. A. F. for rent of said real estate the sum of — dollars, with interest on each instalment thereof from the date of its maturity as above stated. Plaintiff says that J. R. F., the husband of said S. A. F., joined with her in the execution of said lease.

Wherefore said plaintiff asks for a decree against said S. A. F. for \$—, with interest as above stated, and that the same be decreed to be a lien on said leasehold estate and premises, and that the court will decree a sale of said leasehold estate and all interest of the defendant therein for the payment of said indebtedness, and he asks for all other proper relief.

C. & C., Attorneys for Plaintiff.

NOTE.— Adapted from *Evans v. Fortney*, error to circuit court of Hamilton county, Ohio, Supreme Court, unreported, No. 1954.

Sec. 742. Petition for breach of covenant for quiet enjoyment.—

On the — day of —, 18—, plaintiff duly executed and delivered to said defendant a lease for a term of — years, from the — day of —, 18—, to the — day of —, 18—,

for the following described premises situate in —, etc.:
[*Description.*]*

That said lease was made at a yearly rental of \$—, and contained a covenant that said lessor, for himself, his heirs, executors and administrators, would permit plaintiff, upon promptly paying the rent as therein stipulated, to quietly enjoy the possession of said premises during said term.

That the plaintiff thereupon entered into possession of said premises under said lease, but on the — day of —, 18—, was lawfully evicted therefrom by R. O., who possessed the paramount title to the same.

That the plaintiff while in possession of said premises carried on the business of —, and was compelled to expend the sum of \$— in removing his goods to another store-room and lost the trade of numerous customers by the removal, and by reason of the premises was damaged in the sum of \$—, for which he asks judgment.

NOTE.— See *McAlpin v. Woodruff*, 11 O. S. 120; *Collins v. Lewis*, 54 N. W. Rep. 1056. It seems unnecessary to attach a copy of lease when the action is for breach of covenants.

Sec. 743. Petition by assignee of lessor against assignee of lessee on covenant to insure.—

That on the — day of —, 18—, by a certain lease then duly made between S. A. P. and J. O. F., said C. D. leased to E. F. the following described premises, to wit [*describe premises*], for a term of — years, beginning on the — day of —, 18—, and ending on the — day of —, 18—, at a yearly rental of \$—.

That by one of the covenants in said lease the said lessee was to keep said premises fully insured in the sum of \$—, for the benefit of the lessor, and that if at any time said lessee should fail to keep the same so insured, the said lessor, S. A. P., might cause an insurance to be made on said premises at the expense of said lessee and in the name and for the benefit of said lessor.

That on the — day of —, 18—, C. D. sold and assigned to the plaintiff all his interest in said lease, and on or about said date all the interest of E. F. in the premises and lease was sold under an order of court to satisfy a judgment against said E. F., and the defendants became the purchasers at said sale of the interest of said lessee in said premises.

That defendants thereupon took possession of said premises under said sale, while a policy of insurance thereon for the sum of \$—, procured by E. F. in pursuance of said covenant, was still in full force and effect. That on the — day of —, 18—, said policy of insurance expired. That the plaintiff thereupon notified defendants to insure said premises as required by said covenant, which they neglected and refused to do.

That on the — day of —, 18—, the plaintiff insured the same according to the tenor and provisions of said covenant and expended therein the sum of \$—.

That no part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$—.

NOTE.—From *Masury v. Southworth*, 9 O. S. 841. The assignee of a lease may bring suit in his own name; a covenant to insure runs with the land. *Id.*

Sec. 744. General form of petition for breach of covenants for non-repair, etc.—

On the — day of —, 18—, plaintiff duly executed and delivered to said defendant O. D. a lease, and thereby leased to said defendant, for the term of — years, from the — day of —, 18—, to the — day of —, 18—, at a yearly rental of \$—, the following described premises situate in the county of —, Ohio, to wit: [*Description.*]

That by the terms of said lease said defendant expressly covenanted that he would [*copy covenant as to repairs or any other*].

That said defendant took possession of said premises under and by virtue of said lease, and continued to occupy the same during said term, but has not [*state covenant broken*].

That by reason of the failure of said defendant to fully and completely comply with the terms of said lease aforesaid, said premises have become greatly depreciated in value in the sum of \$—.

[*Prayer.*]

NOTE.—As to liability of tenant for repairs, see *Scott v. Haverstraw Brick Co.*, 135 N. Y. 141; *Lydecker v. Brintnall*, 83 N. E. Rep. 899 (Mass., 1898).

Sec. 745. Petition for waste committed by lessee.—

[*Averments as in ante, sec. 742, to *.*]

That the defendant lessee, while so occupying said premises, on the — day of —, 18—, in violation of the terms of his said lease, and not being authorized by this plaintiff, did [*set forth waste committed*].

That by reason of said wrongful acts of said defendant in [*state waste committed*] has greatly damaged plaintiff's premises [*state any special damages*] in the sum of \$—, for which sum plaintiff asks judgment against said defendant.

Sec. 746. Use and occupation — Defenses.— If the building be destroyed by the elements or other cause, without fault of lessee, so as to become unfit for occupancy, he will not be liable to pay any rent to the lessor or owner thereof for such injury, unless otherwise provided.¹ In an action by the land-

¹R. S., sec. 4118; *Avery v. House*, 2 O. C. C. 246.

lord against the tenant to recover possession, it is no defense to show that the parties were both *in pari delicto* in the unlawful use of the premises causing the forfeiture.¹ A tenant is entitled to a proportionate reduction of rent where he is evicted from a portion of the premises by a stranger under a paramount title; and he is entitled to be relieved entirely if evicted by his landlord.² Where there has been a breach of a covenant for quiet enjoyment, and an action is brought to recover rent subsequently falling due, the tenant may counter-claim and recover his damages.³ The tenant may also make a defense that the landlord has neglected to comply with the terms of the lease so that the premises have become untenable, by reason of which he was compelled to leave the same.⁴ The general rule is that in actions for rent the tenant will not be permitted to question or impeach the landlord's title. But there are exceptions. The tenant may show that the landlord's title has expired, or has been terminated or extinguished by his own act or by operation of law.⁵ After the termination of a lease the lessee may, without surrendering the same, assert a claim to a superior title.⁶ A defendant may unite, as defenses to an action for rent, want of legal or valid consideration for the lease, and a counter-claim for damages for a violation of the terms of the lease, if it be found that it is supported by a proper consideration, without being compelled to elect upon which he will rely.⁷

Sec. 747. Answer of surrender of lease.—

Defendant alleges that on the — day of —, 18—, before the rent sued for by plaintiff became due and payable from the defendant under the lease set forth in plaintiff's petition,

Justice v. Lowe, 26 O. S. 372.

¹ Crown Mfg. Co. v. Gay, 18 W. L. B. 188 (Ham. Co. D. C., 1885).

² Collins v. Lewis, 54 N. W. Rep. 1056 (Minn., 1898); Gobel v. Hough, 26 Minn. 352.

³ Minneapolis v. Williamson, 52 N. W. Rep. 986 (Minn., 1892); Lawrence v. Marble Co., 30 N. Y. S. 698; Pierce v. Joldersma, 91 Mich. 462; Young v. Collett, 68 Mich. 381.

⁴ Rooker v. Demerit, 1 O. C. C. 156;

Robertson v. Biddell, 18 So. Rep. 358 (Fla., 1898); Lane v. Young, 21 N. Y. S. 838; Jackson v. Rowland, 6 Wend.

670; Despard v. Walbridge, 15 N. Y. 374; Hilbourn v. Fogg, 99 Mass. 12.

⁵ Dodge v. Phelan, 21 S. W. Rep. 309 (Tex., 1898); McKie v. Anderson, 78 Tex. 207.

⁷ Hooven & Allison Co. v. National Cordage Co., 27 W. L. B. 18 (Cin. Super. Ct.), and cases cited.

he surrendered said premises to plaintiff, who accepted the same.

Sec. 748. Answer of eviction of tenant by third person.—

[*Caption.*]

That on the — day of —, 18—, and after the making of the lease set forth in said petition, and before any part of the rent demanded in said petition became due, one E. F. brought suit in the — court of — of — county, and state of Ohio, against this defendant and said plaintiff to recover possession of said premises, to which suit said plaintiff appeared, filed an answer and stood trial, and such proceedings were had that on the — day of —, 18—, judgment was recovered by said E. F. against this defendant and said plaintiff for the possession of said premises, and thereupon this defendant yielded the possession of said premises to said E. F., and on an execution issued on said judgment said plaintiff was duly ousted on the — day of —, 18—, by the sheriff of — county, which judgment is still in force and unreversed.

Sec. 749. Answer of loss of building by fire — Covenant to rebuild.—

[*Caption.*]

That in the lease executed by the plaintiff to the defendant for the premises described in the petition the plaintiff covenanted that if the building so leased by defendant should, during the time it was so leased, be destroyed by fire, he would immediately rebuild it.

That before any part of the rent sued for became due said building was, without any fault of defendant, destroyed accidentally by fire, by reason whereof defendant has not been able to occupy any part of said premises.

That the plaintiff has wholly failed to rebuild said building.

[*Prayer.*]

NOTE.— R. S., sec. 4112.

Sec. 750. Answer of loss by fire without covenant to rebuild.—

[*Caption.*]

That the premises leased by defendant for which the plaintiff claims rent consisted of three rooms in a large four-story building, occupied by stores below and offices on the upper floors, severally, by different tenants.

That on the — day of —, 18—, and before the rent claimed or any part thereof was due, said building, without the fault of defendant, was wholly destroyed by fire, by reason whereof defendant has since been unable to occupy said premises.

Sec. 751. Answer of eviction by law as a defense in an action for rent.—

[Caption.]

Defendant alleges that after he went into possession of the premises under the lease set forth in plaintiff's petition, and before the rent thereon became due and payable, the said plaintiff ejected and dispossessed defendant from said premises, and that plaintiff has since had possession thereof.

CHAPTER 54.

LIBEL AND SLANDER.

Sec. 752. Libel and slander—Defined.	Sec. 761. Petition in slander in charging unchastity of female.
753. What is actionable.	762. Slander of title.
754. Libel and slander—The petition.	763. Petition charging slander of title.
755. Petition for libel—Illustrating use of innuendo.	764. Libel and slander—The answer.
756. Petition for libel charging dishonesty in business.	765. Answer to charge of perjury.
757. Petition charging slander in speaking words actionable <i>per se</i> .	766. Answer in mitigation of libel.
758. Petition charging slander by uttering words indirectly charging a crime.	767. Answer claiming justification.
759. Petition in slander charging perjury.	768. Answer of want of chastity.
760. Petition for libeling an attorney—with innuendo.	769. Answer that defamatory matter was printed as part of judicial proceedings.

Sec. 752. Libel and slander—Defined.—It is a settled rule of law that every publication of language which tends to injure another in his business, trade or employment is, if without justification, libelous or slanderous, as the case may be, and actionable *per se*.¹ Where one falsely and maliciously orally charges another with anything involving moral turpitude, which, if true, will subject him to infamous punishment or will tend to exclude him from society, or prejudice him in his office, profession, trade or business, the party accused may seek redress by suit in slander, and recover without proof of actual damages. Where the words are false, the law infers malice; and where their actual tendency is to injure, the law presumes damages.² It is not necessary that the words used in a published article be slanderous to maintain an action for libel.³ To speak or write of a trader that he is insolvent, or

¹ Watson v. Trask, 6 O. 533.

² Watson v. Trask, *supra*; Hatt v. News Assoc., 94 Mich. 114; Tryon v.

Evening News, 39 Mich. 636. See Odgers on L. & S., p. 20, and note.

³ Prosser v. Callis, 117 Ind. 105.

of an innkeeper that his house is infected with a contagious disease, or to impute dishonesty or incapacity to one in his business, is actionable without any averment or proof of special damages.¹ Where the language does not import defamation, the special damages suffered must be alleged.²

Sec. 753. What is actionable.—The general rule of law is that where the charge, if true, would subject the plaintiff to an indictment for a crime involving moral turpitude, or to an infamous punishment, the words are actionable *per se* without proof of actual damages.³ In an action against another for

¹ Hodge, S. & L., 80; Whittaker v. Bradley, 16 E. C. L. 810; Pollard v. Lyon, 91 U. S. 225; Price v. Conway, 134 Pa. St. 840; Manufacturing Co. v. Perkins, 78 Mich. 1; Orr v. Schofield, 56 Me. 483; Moore v. Rolin, 15 S. E. Rep. 520 (Va., 1892); Newbold v. Bradstreet, 57 Md. 88.

² Moore v. Rolin, *supra*; Townshend v. S. & L., sec. 146 et seq.

³ Alfele v. Wright, 17 O. S. 238; Watson v. Trask, 6 O. S. 531; Dial v. Holter, 6 O. S. 228. Words imputing the crime of larceny. Ball v. White, 89 O. S. 650; Reinhardt v. Faschnacht, 4 O. C. C. 321. Thief. Fedtman v. Hancock, 1 O. C. C. 238. See Hollingsworth v. Shaw, 19 O. S. 433; Hamm v. Wickline, 26 O. S. 81; Cheadle v. Buell, 6 O. S. 67; McKean v. Folden, 2 W. L. M. 146. False swearing to be actionable must be such as would be perjury. Wilson v. Oliphant, W. 153; Waggoner v. Richmond, W. 173. Charging in substance that the person would commit the crime of perjury is libel *per se*. Sanford v. Rowley, 93 Mich. 119. An action cannot be maintained for calling one a deserter without an averment of special damages. Hollingsworth v. Shaw, 19 O. S. 430. If the words spoken, taken in connection with matter set up by way of inducement, clearly impute the commission of a crime, they are ac-

tionable even though under the circumstances and manner of speaking them they might not be actionable *per se*. Karger v. Rich, 81 Wis. 177. But if language used be calculated to induce those who read it to believe a person of whom it is written guilty of crime, it is sufficient to support the action. Democrat Pub. Co. v. Jones, 18 S. W. Rep. 652 (Tex., 1892); Zeeliff v. Jennings, 61 Tex. 458; Stroebel v. Whitney, 81 Minn. 384; Lewis v. Hudson, 44 Ga. 568; Proctor v. Owen, 18 Ind. 21; Prosser v. Callis, 117 Ind. 105; Crocker v. Hadley, 103 Ind. 416. If words in their ordinary acceptance amount to a charge of fornication, and the speaker so intends, and those who hear so understand, they are actionable. Ranson v. McCurley, 31 N. E. Rep. 119 (Ill., 1892); Barnes v. Hammon, 71 Ill. 609; Schmisser v. Kreilich, 92 Ill. 847. But an action cannot be maintained for words which impute a crime where it appears from all the circumstances that they had relation to a transaction not criminal, and were so understood. Brown v. Meyers, 40 O. S. 99; Carmichael v. Shiel, 21 Ind. 66; Williams v. Mines, 18 Conn. 473. A publication that a member of an official board was a liar, thief and perjurer is libelous *per se*. Orth v. Featherly, 87 Mich. 315. To print

falsely charging perjury, it is not necessary by colloquium to aver that the word was used in reference to testimony in a judicial proceeding in which the plaintiff had been sworn as a witness.¹ A petition which sets out the language used, and states that in using the same the defendant intended to charge plaintiff with a crime, contains a good cause of action.² Charging a teacher with punishing a pupil so severely that it caused death is actionable;³ and so with a charge that a county official published a false statement of the financial condition of the county;⁴ or charging a clergyman with drunkenness;⁵ or a man with being afflicted with venereal disease;⁶ or words spoken of a female which tend to bring her into contempt and prevent her from occupying a proper position in society;⁷ or charging another with maliciously removing a corner-stone on lands;⁸ or a publication by a railroad company that certain goods shipped by a consignor remained undelivered because the consignee was unable to pay the freight;⁹ or a newspaper publication making charges against a public official which tend to diminish public respect and confidence.¹⁰ Words spoken, however, of an official in the discharge of duties are not actionable.¹¹ Nor is it actionable *per se* to publish of another that he is a political traitor and liar.¹² It is libelous, and therefore actionable, for a notary public to falsely and maliciously protest a negotiable instrument.¹³

Sec. 754. Libel and slander — The petition.— The codes of some states have simplified the method of pleading in actions for libel and slander by providing that it shall be suffi-

and publish of a person that he "is as charging want of chastity, Bar-
said to have been in the work-house, nett v. Ward, 86 O. S. 107.

and to have a criminal record," is ⁸ Dial v. Holter, 6 O. 228.

libelous *per se*. Post Pub. Co. v. ⁹ Campbell v. Bostick, 22 S. W.
Maloney, 50 O. S. 71. Rep. 828 (Tex., 1893).

¹ Stickels v. Hall, 3 O. C. C. 398; ¹⁰ Bishop v. Gazette Co., 4 W. L. B.
Green v. Long, 2 Caines, 91. 1082; Spiering v. Andrae, 2 Clev. Rep.

² Reinhardt v. Faschnacht, 4 O. C. 26.
C. 321. ¹¹ Goodenow v. Tapin, 1 O. 60.

³ Doan v. Kelley, 121 Ind. 413. ¹² Settlege v. Kampf, 19 W. L. B.
⁴ Prosser v. Callis, 117 Ind. 105. 321.

⁵ Hayner v. Cowden, 27 O. S. 292. ¹³ May v. Jones, 15 L. R. A. 637; 88

⁶ Kaucher v. Blinn, 29 O. S. 63. Ga. 308 (1891). See Van Epps v.

⁷ Malone v. Stewart, 15 O. 319; Jones, 50 Ga. 238.

Murray v. Murray, 1 C. S. C. R. 290;

cient to state, generally, that the defamatory matter was published or spoken of the plaintiff. If the allegation be denied, the plaintiff must prove the facts showing that the defamatory matter was spoken of him. It is not necessary to set out any obscene word, the substance only being essential.¹ Codes of other states provide in so many words that it is not necessary to state extrinsic facts to show the application of the defamatory matter to the plaintiff.² These provisions have caused confusion upon the question of the necessity and use of the *innuendo* and *colloquium*, as well as the necessity of averring extrinsic facts. It seems to be considered by some authorities that the code dispenses with the necessity of pleading extrinsic facts. But the innuendo must be used where the publication does not appear on its face to be of a defamatory character, and only becomes so by reference to extrinsic facts, in which case the existence of those facts must be alleged to show a libelous meaning.³ But where the words themselves tend to injure the reputation, the allegation of extrinsic facts is not necessary.⁴ The office of an innuendo is to direct attention to the charge made. It can neither enlarge nor restrain the natural sense and import of words used. If they are not in themselves libelous, or are incapable of a libelous meaning without the aid of an innuendo, they cannot be given that capability by the use of an innuendo.⁵ But when the language is ambiguous, or appears upon its face to be harmless, it may be explained by an innuendo and rendered actionable.⁶ It is

¹ Ohio R. S., sec. 5093; Nebraska Code (1891), sec. 4668; Swearingen v. Stanley, 23 Ia. 115; Wesley v. Bennett, 6 Duer, 688. A complaint which does not set out the slanderous words is insufficient. Their effect, only, will not answer. Smail v. Fisher, 2 Ind. App. 426; 26 N. E. Rep. 714.

² N. Y. R. S., sec. 535; Iowa Code, sec. 2681 (1889), sec. 4208. See Kinyon v. Palmer, 18 Ia. 377.

³ Harrison v. Manship, 120 Ind. 43; McFadin v. David, 78 Ind. 445; Wachter v. Quenzer, 29 N. Y. 547; Fry v. Bennett, 28 N. Y. 324; Dias v. Short, 16 How. 322; Blaisdell v. Ray-

mond, 14 How. Pr. 265; Wallace v. Bennett, 1 Abb. N. C. 478.

⁴ Moore v. Bennett, 48 N. Y. 472.

⁵ Tappan v. Wilson, 7 O. (Pt. 1), 190; Fleischman v. Bennett, 87 N. Y. 231; Arrow Steamship Co. v. Bennett, 25 N. Y. S. 1029; Bishop v. Gazette Co., 4 W. L. B. 1082.

⁶ Bishop v. Gazette Co., 4 W. L. B. 1082; Sturt v. Blogg, 10 Q. B. 908; Pond v. Hartwell, 17 Pick. 269; Maynard v. Insurance Co., 47 Cal. 207; Wachter v. Quenzer, 29 N. Y. 547; Glatz v. Thein, 47 Minn. 278. See Stevens v. Handley, W. 123. Words not actionable in themselves should

not the office, however, of the innuendo to make averments.¹ The court must determine whether the language bears the meaning ascribed to it by the innuendo, and whether the same is truly assigned is for the jury.²

The provisions of the code heretofore referred to were clearly intended to dispense with the necessity of the colloquium, as it provides that it must be stated that the words were spoken of the plaintiff.³ In any event, if it be denied that the words were spoken of and concerning the plaintiff, they must be established.⁴ It is, however, dispensed with only when it is unnecessary to show that the defamatory words applied to the plaintiff. The averments required in common-law pleading to show the meaning of the words must still be made.⁵

The petition must also show that the libelous matter was published of some person in some way designated or indicated, so that reference may be made to it by the pleader as applicable to the plaintiff, and the actionable quality of the matter published as relating to the plaintiff must appear.⁶ And where the name of the person libeled is not given it will be sufficient to aver that the defamatory matter was published of the plaintiff.⁷ The defamatory matter should be specified in the body of the petition with precision, and there should

be introduced by way of inducement. *Wilson v. Runyon*, W. 658; *Brown v. Kincaid*, W. 87. Or special damages should be alleged. *Foster v. Boue*, 88 Ill. App. 618; *Benz v. Weidenhoeft*, 88 Wis. 397; *Erwin v. Dezell*, 64 Hun, 891; *Barnard v. Press Pub. Co.*, 17 N. Y. S. 573; *Odgers, S. & L.*, p. 112. Whether the language will bear the meaning ascribed it by the innuendo the court must determine, and the jury must decide whether such a meaning was intended. *English v. English*, 11 W. L. B. 128; *Democrat Pub. Co. v. Jones*, 18 S. W. Rep. 652; *Patch v. Association*, 88 Hun, 563; *Harris v. Zanone*, 93 Cal. 59-65.

¹ *Bundy v. Hart*, 46 Mo. 464; *Cristal*

v. Craig, 80 Mo. 367; *Powell v. Crawford*, 107 Mo. 595.

² *Gohen v. Volksblatt Co.*, 81 W. L. B. 111; *Townshend on S. & L.*, sec. 842.

³ O. Code, sec. 5093; *Nebraska Code* (1891), 4668. But see *Powell v. Crawford*, 107 Mo. 595.

⁴ *Harris v. Zanone*, 93 Cal. 59-65.

⁵ *Bliss on Code Pleading*, sec. 305; *Fry v. Bennett*, 5 Sand. 54; *Petsch v. Dispatch P. Co.*, 40 Minn. 291; *McLaughlin v. Russell*, 17 O. 479; *Pike v. Van Wermer*, 5 How. Pr. 175.

⁶ *Carlson v. Tribune Co.*, 47 Minn. 387; 50 N. W. Rep. 229; *Smith v. Coe*, 22 Minn. 276; *Petsch v. Printing Co.*, 40 Minn. 291; 41 N. W. Rep. 1034; *Smail v. Fisher*, 2 Ind. App. 426.

⁷ *Powers v. Seaton*, 2 W. L. M. 532.

be direct allegations pointing out in what particular the language was libelous.¹ When words are published in a foreign language they should be set forth in that language, accompanied by a translation of their meaning in English, and an averment that they were understood by those who heard them.²

It is a general rule that malice need not be alleged where words are actionable *per se*.³ In cases of libel and slander a distinction between malice in law and in fact is recognized. The former is inferred from the doing of a wrongful act without justification. The latter is distinguished from malice in law in that it is proved expressly, while the former is inferred from the publication of the false language. Even though it be inferred from the publication, it is nevertheless a question of fact in respect to which evidence may be admitted to show what it is, or the proper inference to be drawn.⁴ Where actual malice is shown, punitive damages may be assessed.⁵

To render words which are of such character, or which have been spoken under such circumstances, that they may fall within the purview of "privileged communications," actionable, actual malice must be averred and proved.⁶ An action will not lie

¹ *Brown v. Durham*, 22 S. W. Rep. 894; *Simonsen v. Herald Co.*, 61 868 (Tex., 1893); *Bradstreet v. Gill*, Wis. 626; *Bower v. Deideiker*, 38 Ia. 77 Tex. 117; *Lynde v. Johnson*, 39 418. See *Bechtell v. Shatler*, W. 107; *Hun*, 12; *Cassidy v. Daily Eagle*, 188 Lettmann v. Ritz, 8 Sand. 734; *Glatz v. Thein*, 47 Minn. 278.

² *Robinson v. Hatch*, 55 How. Pr. 55.

³ *Smith v. Rodecap*, 81 N. E. Rep. 479 (Ind., 1892); *Townshend, S. & L.* (4th ed.) 68. See 6 L. R. A. 680, note. It should be stated that they were published maliciously. *Hovey v. Pencil Co.*, 57 N. Y. 119; *Kendall v. Stone*, 5 N. Y. 14; *Dial v. Holter*, 6 O. S. 238. Evidence of slanderous statements other than those set forth in the petition may be introduced as bearing on the question of malice. *Enoss v. Enoss*, 135 N. Y. 609.

⁴ *Orth v. Featherly*, 87 Mich. 315; *Commercial Gazette Co. v. Grooms*, 21 W. L. B. 292.

⁵ *Crist v. Bradstreet*, 17 W. L. B. 138; *Bishop, Non-Cont. Law*, sec. 97 Ind. 430.

⁶ *Wormouth v. Cramer*, 3 Wend.

for libelous statements classed as privileged communications, of which rule there are many illustrations; for example, statements in an answer honestly made under advice of counsel, without malice;¹ or by a witness testifying in a judicial proceeding;² or by an attorney for words spoken in the course of a judicial proceeding;³ or in a communication addressed to a court pertaining to the character of an applicant for admission to the bar;⁴ or in fact any statements made in pleadings or court proceedings, though maliciously and falsely made.⁵

If words are not actionable *per se*, special damages should be averred;⁶ or they may be shown to be slanderous by an allegation that at the time and place they were spoken they had an actionable meaning.⁷ If language not in itself libelous, is understood in a libelous sense, the allegation and proof must show that the person to whom the language was published was acquainted with such extraneous facts.* It has been held that a petition which alleges that "all of said words were false and defamatory, and that by reason of speaking said false, slanderous and defamatory words the plaintiff has been greatly damaged," is sufficient as against a demurrer.⁸ In charging injury to one in his vocation it is not necessary to allege that the plaintiff was in receipt of emolument,⁹ though it should be averred that the words were used in reference to his profession.¹⁰ When an action is brought for slanderous words spoken at different times, each set of words constitutes a separate cause of action and should be separately stated and numbered.¹¹ Though a seller of a newspaper containing a libelous article is not liable unless he had knowledge of the

306; *Railway Co. v. Richards*, 73 Tex. 575; *Campbell v. Bostick*, 22 S. W. Rep. 828 (Tex., 1893).

¹ *Lanning v. Christy*, 80 O. S. 115; *Hill v. Miles*, 9 N. H. 12; *Kidder v. Parkhurst*, 8 Allen, 393; *Marsh v. Ellsworth*, 50 N. Y. 311.

² *Hunckel v. Voneiff*, 20 W. L. R. 186 (Md.); *Townshend on L. & S.*, sec. 223; *Lies v. Gaster*, 42 O. S. 631; *Cooley on Torts*, 211; *Lanning v. Christy*, 80 O. S. 115.

³ *Maulsby v. Reifsnider*, 20 W. L. R. 189 (Md.).

⁴ *Wilson v. Whitacre*, 4 O. C. C. 15; *Bigelow on Torts*, pp. 53, 84.

* *Steele v. Edwards*, 15 O. C. C. 52.

⁵ *Bartlett v. Christhill*, 30 W. L. R. 193. See p. 734, note 2.

⁶ *Basil v. Elmore*, 65 Barb. 627.

⁷ *Emmerson v. Marvel*, 55 Ind. 265; *Work v. Stevens*, 76 Ind. 181; *Logan v. Logan*, 77 Ind. 558.

⁸ *Born v. Rosehow*, 84 Wis. 620; 54 N. W. Rep. 1088 (1893).

⁹ *Hayner v. Cowden*, 27 O. S. 292.

¹⁰ *Van Epps v. Jones*, 50 Ga. 238; *Barnes v. Trundy*, 31 Me. 321; *Blow v. Tobey*, 2 Pick. 320; *Starkie on Slander*, 109, 106.

¹¹ *Swinney v. Nave*, 22 Ind. 178;

Fleischman v. Bennett, 87 N. Y. 231.

See *ante*, sec. 28, n. 11

article, yet it is not necessary to allege knowledge on his part, as that is matter of defense.¹

It is not essential that the plaintiff in stating his cause of action plead good character, and the prevailing doctrine is that he is not allowed in the first instance to give evidence to show that fact. It is only necessary for him to prove good character when it has been assailed by the defendant.² While the defendant is permitted to show the general bad character of the plaintiff he is not allowed to prove any specific act.³ An allegation in the petition that the plaintiff's character is good and a denial thereof in the answer does not raise a material issue.⁴

Sec. 755. Petition for libel — Illustrating use of innuendo.—

Plaintiff avers that the said defendants, and each and both of them, well knowing the good name, character and reputation of the said plaintiff at said village, county and state aforesaid, for the purpose, and with malicious and wicked intent, to injure plaintiff in his good name, character and reputation, and to bring him into public scandal, infamy and disgrace with and among his neighbors and other good citizens of said county and state, and to cause it to be believed by said neighbors and citizens aforesaid that the plaintiff was guilty of the crime and offense of falsely and fraudulently procuring and obtaining the names and signatures of the said defendants, and each and both of them, to certain valuable written orders and contracts by false and fraudulent pretenses, did on or about the — day of —, 18—, at —, in the county of —, and state of Ohio, aforesaid, falsely, wilfully, maliciously and wickedly write, compose and publish, and did then and there cause to be written, composed and published, of and concerning this plaintiff, a certain false and malicious libel in a certain newspaper called "The Independent," printed and published at said —, — county, Ohio, which has a large and general circulation therein, and which said false and malicious libel, so written, composed and published by said

¹ *Street v. Johnson*, 80 Wis. 455; *dence*. 3 *Sutherland on Damages*, s. c., 14 L. R. A. 637. 655; *Shroyer v. Miller*, 3 W. Va. 158.

² *Blakeslee v. Hughes*, 50 O. S. 490; ³ *Vick v. Whitfield*, 2 O. 222; *De Newell on Def. & S.*, pp. 771-823. *Witt v. Greenfield*, 5 O. 225; *Fitzgerald v. Stewart*, 53 Pa. St. 343.

The law presumes plaintiff's character to be good (1 *Hilliard on Torts*, sec. 63), though some courts and writers maintain that plaintiff may confirm this presumption by evi- ⁴ *Stafford v. Morning Journal Ass'n*, 22 N. Y. S. 1008; *Chapman v. Pickersgill*, 2 Wils. 145; *Townshend on S. & L.* (4th ed.) 313, 314.

defendants and each and both of them, of and concerning the said plaintiff, is in the words and figures following, to wit: [*Copy publication entire, using innuendo if necessary, as follows:*] *Illustration of use of innuendo:*

WARNING — WARNING.

We (meaning thereby the residents and citizens of H.) have in our village (meaning thereby the village of H.) one J. B. (meaning thereby the plaintiff), who is now and has been for some time past traversing our county (meaning thereby the county of D.), etc., etc. Some time ago B. (meaning the plaintiff), etc. Afterwards (meaning after the said defendants had signed said order) this man B. (meaning thereby plaintiff), etc.

The said plaintiff further avers that said defendants and each and both of them caused the above and foregoing false and malicious libel of and concerning plaintiff to be published and printed in the newspaper aforesaid, at the place and time aforesaid, with the intent and for the purpose of thereby wilfully and maliciously injuring plaintiff in his good name, character and reputation, and did thereby greatly injure plaintiff in his good name, character and reputation. The plaintiff further says that said defendants, each and both of them, wrote, composed and caused said libel to be published and printed as aforesaid, of and concerning said plaintiff, for the purpose and with the malicious and wicked intent of thereby causing it to be believed and suspected among the people and citizens of said village, county and state aforesaid, generally, that the said plaintiff had falsely and fraudulently, and by false pretenses and fraudulent representations, obtained and procured the names and signatures of the said defendants, and each and both of them, to certain orders and contracts, evidences of indebtedness, for the Personal Memoirs of U. S. Grant, of great value, viz., of the value of — dollars each, with intent to defraud the said defendants and each of them. Plaintiff further avers that by reason of the writing, composing and publishing of said false and malicious libel by said defendants, and each and both of them, of and concerning this plaintiff, he has sustained damages in the sum of — dollars.

Wherefore plaintiff prays for judgment against the said defendants for the said sum of — dollars, his damages so as aforesaid sustained.

T. & F. and H. & C.,

Attorneys for Plaintiff.

NOTE.— Changed from *Blakeslee v. Hughes*, 50 O. S. 490. In this case the petition contained a lengthy averment as to residence of plaintiff and as to his good character. Evidence was given in chief of plaintiff's good character, for which action the trial court was reversed. So that allegations of good character should not be made. See *ante*, sec. 754.

Damages are nominal when there is no injury in fact. *Rollins v. Pennock*, 5 W. L. M. 154. Pecuniary ability to pay defendant may be cou-

sidered. *Alpin v. Morton*, 21 O. S. 536. Loss of business, *Van Ingen v. Newton*, 1 D. 482. While courts have permitted evidence of defendant's wealth on the question of actual damages, some have recognized the danger, and have shown a disposition to retract if not altogether reject it. *Randall v. Evening News Ass'n*, 56 N. W. Rep. (Mich., 1893); *Case v. Marks*, 20 Conn. 248; *Watson v. Watson*, 53 Mich. 176; 18 N. W. Rep. 605.

Malice: The malice of the editor of a paper is the malice of the corporation publishing the same. *Allen v. News Pub. Co.*, 81 Wis. 120; 50 N. W. Rep. 1093.

Limitation: Action for slander must be commenced in one year. R. S., sec. 4983. This provision is strictly construed, and the limitation will commence to run from the speaking of the words, not from the time plaintiff first had knowledge of them. *Pearl v. Koch*, 82 W. L. B. 52 (1894).

Sec. 756. Petition for libel charging dishonesty in business.—

Plaintiff states that he has been engaged in the business of [*state business*] in the city of —, county of —, Ohio, for — years past.

That the degree of success or prosperity of plaintiff in said business, in a large measure, is dependent upon his reputation for truth and honesty among the citizens of said C., and upon the credit given and confidence reposed in him by the general public and those with whom he deals, and particularly his customers.

That the defendant is now and was on the — day of —, 18—, the publisher and proprietor of a certain newspaper called —, published in said city of —, and having a large circulation therein.

That defendant on the — day of —, 18—, with the intent and for the purpose of wilfully and maliciously injuring plaintiff in his good name, character and reputation in his said business, did write and cause to be published of and concerning plaintiff in his said business the following false and libelous matter, to wit: [*Copy libelous matter.*]

That by reason of the said false and malicious publication of said libel of and concerning plaintiff in his said business, he has been damaged in the sum of \$—, for which sum he asks judgment against said defendant.

NOTE.—See *Dial v. Holter*, 6 O. S. 228; *Van Ingen v. Newton*, 1 Disn. 482; *Mitchell v. Bradstreet Co.*, 22 S. W. Rep. 358; *Brown v. Vannaman*, 85 Wis. 451; 55 N. W. Rep. 183. The words must be clearly shown to have been spoken of plaintiff in his business. *Carroll v. White*, 33 Barb. 615.

Sec. 757. Petition charging slander in speaking words actionable per se.—

[*Caption, etc.*]

Plaintiff states that the defendant, maliciously intending to injure and slander plaintiff in his good name, on the — day of —, 18—, at —, in a certain conversation which said defendant then had with certain persons, citizens of the city of —, in the state of Ohio, did wickedly and maliciously

say, in the presence and hearing of said persons and citizens of the city of — aforesaid, certain false and slanderous words of and concerning plaintiff, which are as follows, to wit: You (meaning plaintiff) are a robber; you (meaning plaintiff) are a damned robber; I (meaning said defendant) believe you are a robber and a thief; you (meaning plaintiff) are a counterfeiter (meaning that the said plaintiff had been guilty of counterfeiting money, or some evidence of debt, or some papers executed for a valuable consideration); I (the said defendant meaning) believe you are a counterfeiter [*or set forth in like manner the other slanderous words, e. g., you (meaning the said plaintiff) are perjured*].

That by reason of the speaking, publishing and uttering of said false, scandalous and malicious words the said plaintiff has been greatly prejudiced in his good name, fame and reputation, and also greatly injured in his business [*set forth special damage, if any*]. Plaintiff therefore says that he is injured and has sustained damages to the amount of — dollars, for which he asks judgment.

NOTE.— Words charging venereal disease are actionable *per se*. *Kau-cher v. Blinn*, 29 O. S. 62.

Sec. 758. Petition charging slander by uttering words indirectly charging a crime.—

[*Caption.*]

Plaintiff says that the defendant contriving to injure him, and to bring him into public ridicule, did, on the — day of —, 18—, falsely and maliciously speak and publish of and concerning plaintiff and of and concerning the theft of certain goods and chattels, to wit [*specify what*], of one E. F., of the value of \$—, which had been theretofore feloniously stolen, taken and carried away, to wit, at —, on or about the — day of —, 18—, the false and malicious words following, to wit: He (meaning the said plaintiff) had a hand in the affair (meaning the said theft of the said goods and chattels), and thereby then and there meaning that the said plaintiff had been and was guilty of [feloniously stealing, taking and carrying away of the said goods and chattels], insomuch that many of the persons, neighbors and citizens, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the speaking and publishing of which said several false, malicious and defamatory words by said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the said plaintiff to have been and to be a person guilty of theft so as aforesaid charged upon and imputed to him by the said defendant, and have, by reason thereof, wholly refused, and still do refuse, to have any business transaction or conversation with plaintiff, as they were before used and accustomed

to have, and also [*state special damages*]; and also, by means of the premises, the said plaintiff has been greatly injured and damaged in the sum of — dollars, for which amount he asks for judgment.

NOTE.— Where the words, if true, would subject the person to an indictment, they are actionable *per se*. *Alfele v. Wright*, 17 O. S. 238. See *Cheadle v. Buell*, 6 O. 87. Charging a man with sodomy is not actionable without special damages. *Davis v. Brown*, 27 O. S. 326. And there must be a special allegation. *Melvin v. Weiant*, 36 O. S. 187.

Sec. 759. Petition in slander charging perjury.—

That at the — term, 18—, of the court of common pleas in — county, Ohio, in a certain action then pending therein between A. B. as plaintiff and C. D. as defendant, said court having jurisdiction of the subject-matter of said suit, upon the trial thereof the plaintiff, being duly sworn in said cause, testified as a witness touching certain matters material to the issue therein.

Thereafter on the — day of —, 18—, defendant, wickedly intending to injure plaintiff, and to cause it to be believed that plaintiff had been guilty of perjury, in a certain conversation which defendant then had of and concerning plaintiff, in the presence and hearing of different persons, did maliciously and falsely speak and publish of and concerning plaintiff, and of and concerning his testimony aforesaid, the following false and defamatory words, to wit: "He," meaning the plaintiff, "has forsworn himself," thereby meaning that the plaintiff in his testimony given at the trial of said action had committed the crime of perjury, by reason of which the plaintiff has been brought into public scandal and disgrace, and greatly injured in his good name, to his damage in the sum of \$—, for which plaintiff asks judgment.

NOTE.— As to charging perjury, see *Boyd v. Sell*, Tapp. 11; *Willis v. Patterson*, Tapp. 276; *Brown v. Kincaid*, W. 87; *Wilson v. Oliphant*, W. 158. It is not slander to charge perjury as to a matter which would not in fact be perjury. *Waggoner v. Richmond*, W. 178.

Sec. 760. Petition for libeling an attorney — with innuendo.—

That the defendant on or about the — day of —, 18—, wickedly and maliciously intending to injure the plaintiff in his good name, credit and fame, and to injure him in his profession and business as an attorney and counselor of this court, and to bring him into disrepute and contempt among all his neighbors and other good and worthy citizens, and to cause it to be believed and suspected by his said neighbors and other citizens that the plaintiff had been and was guilty of malpractice in the practice of his profession, and was incompetent to properly discharge the important duties of his profession, and especially of his position as attorney and counsel to the board

of trustees of the village of O., and to vex, harass and oppress him, the defendant did on the — day of —, 18—, aforesaid, at O., —, falsely, wickedly and maliciously compose and publish, and cause and procure to be published, in handbills, a copy of which is as follows: [*copy*], and circulated and cause to be circulated extensively in the village of O. and vicinity, of and concerning him, the said plaintiff, a false, scandalous and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said plaintiff, that is to say: "Make Burr Mattice attorney for the village so that every person that gets spanked on the ice will be able to obtain a judgment of from \$— to \$— against the village," meaning thereby to charge plaintiff with want of skill and care, as the attorney for the village of O. in defending certain suits against said village, and meaning to charge thereby and did charge plaintiff with neglect in the care and management of suits against the said village, and with wrongful and dishonest conduct in his professional dealings as the attorney of said village.

That by reason of the aforesaid premises the plaintiff has been and is greatly injured in his reputation aforesaid, and has been greatly vexed, harassed and impoverished, and has lost and been deprived of divers and great gains and profits which would otherwise have accrued to him in his profession and business, to his damage in the sum of \$—, for which he asks judgment.

NOTE.—From *Mattice v. Wilcox*, 24 N. Y. S. 1060. To charge that an attorney has never been admitted to the bar and is an impostor is actionable *per se*. *Goldrick v. Levy*, 6 W. L. B. 20. See *Goodenow v. Tappan*, 1 O. 60.

Sec. 761. Petition for slander in charging unchastity of female.—

That the defendant, during the months of — and —, 18—, and on other days, contriving and wickedly and maliciously intending to injure plaintiff in her good name, fame and credit, and to bring her into public scandal, infamy and disgrace with and among all her neighbors and other citizens, and to cause it to be suspected and believed by those neighbors and citizens that the plaintiff had been and was guilty of the offenses and misconduct hereinafter mentioned, to have been made and charged upon her by said defendant, and to vex, harass and oppress her, the said defendant did, at the time aforesaid, at —, in a certain conversation which the defendant then and there had in the presence and hearing of various citizens, falsely and maliciously speak and declare of and concerning plaintiff, in respect to her profession and business, the false and scandalous, malicious and defamatory words

following, that is to say: Miss D. is a common street-runner, etc. [*Continuing with charges made.*]

That by reason of the commission of said several grievances by said defendant as aforesaid plaintiff has been and still is greatly injured in her profession and business as a teacher in the common schools of the [*state where*], and brought into public scandal, infamy and disgrace with and amongst all her neighbors and other citizens, to the damage of the plaintiff in the sum of \$——.

NOTE.— Words charging a woman with unchastity are actionable *per se*. *Alfele v. Wright*, 17 O. S. 238. See *Murray v. Murray*, 1 C. S. C. R. 290. Charging a woman with receiving gentlemen callers late at night does not impute unchastity. *Hemmens v. Nelson*, 133 N. Y. 517. See *McMahon v. Hallock*, 48 Hun, 617; *Indianapolis Journal v. Pugh*, 33 N. E. Rep. 991. Words charging a woman with sleeping with a man not her husband are actionable *per se*. *Barnett v. Ward*, 86 O. S. 107.

Sec. 762. Slander of title.— An action for slander of title will lie against one who falsely and maliciously disparages the title to property of another, thereby causing special damages. Words so spoken are not actionable of themselves; but it is necessary to sustain the action that special damages be averred and proved, and should therefore be distinctly and particularly set forth in the petition.¹ There are three essential elements to an action for slander of title, namely: false words, maliciously published, resulting in a pecuniary loss or injury.² Where a cloud is cast upon the title to land, the petition should contain an averment of malice or the want of probable cause;³ and where the damage resulting consists in defeating a person in securing a loan upon the property, or defeats the sale thereof, the name of the person who refused to make the loan or purchase should be given.⁴

Sec. 763. Petition charging slander of title.—

[*Caption.*]

Plaintiff was on the —— day of ——, 18——, the owner of and seized in fee-simple, by good and sufficient title, of the following described premises situate in the city of ——, county of ——, and state of Ohio, to wit: [*Description.*]

¹ *Linden v. Graham*, 1 Duer, 670; *Stone*, 2 Sandf. 269; *Like v. McKinstrey*, 41 Barb. 186; *Newell on Def. & S.* 202.

² *Linden v. Graham*, 1 Duer, 670; *Hill v. Ward*, 13 Ala. 310; *Kendall v.*

³ *Duncan v. Griswold*, 92 Ky. 546; 18 S. W. Rep. 354 (1892); *Stark v.*

Chitwood, 5 Kan. 141.

⁴ *Linden v. Graham*, 1 Duer, 670.

That on the — day of —, 18—, plaintiff caused the said premises to be put up and offered at public sale, and the defendant, contriving and falsely and fraudulently intending to injure plaintiff, and to cause it to be suspected and believed that plaintiff had no title, estate or interest of, in and to said land, with its appurtenances, and to hinder and prevent plaintiff from selling or disposing of the same, and to otherwise injure plaintiff and put him to expense and trouble, falsely and maliciously caused and procured a certain person, to wit, one W. M., to attend and be present at and upon said sale, and, before the said estate and interest had been sold and disposed of, falsely and maliciously caused and procured the said W. M. to assert and represent, and the said W. M. did then and there accordingly, in the presence and hearing of divers citizens of said county then and there present, of and concerning the plaintiff [and of and concerning the said G. H., so being said auctioneer as aforesaid], and of and concerning the said land and appurtenances and the plaintiff's said estate and interest therein, falsely and maliciously speak and publish the following words in the presence and hearing of those then and there present, viz.: [*Copy words with proper innuendoes.*]

That by reason of the speaking of the said defamatory words by said defendant at said sale, in the presence of the several persons there present for the purpose of bidding upon said premises, and especially J. K., who was then and there about to bid for and would otherwise have purchased the same, were then and there prevented from bidding for and becoming the purchasers thereof, and from thence hitherto have wholly declined to purchase the same; and thereby the said plaintiff has not only lost and been deprived of all the emoluments and advantages which he might and would have derived and acquired from the sale thereof, but has been forced to pay and expend large sums of money, to wit, the sum of — dollars, in and about said exposure to sale and the expenses incidental thereto.

Wherefore the plaintiff says he has been damaged in the sum of — dollars, for which he prays judgment.

Sec. 764. Libel and slander — The answer.— The defendant may allege in his answer the truth of the matter charged as defamatory; and in all cases he may prove every mitigating circumstance to reduce the amount of damages.¹ Where

¹ O. Code, sec. 5094; Wesley v. Bennett, 6 Duer, 688; Steiber v. Wensel, 19 Mo. 518; Carson v. Mills, 69 N. C. 123. See, also, Van Ingen v. Newton, 1 Disn. 458; Shields v. Moore, 2 W. L. M. 487. A defense alleging that slanderous words were privileged and true is a justification. Etchison v. Pergerson, 88 Ga. 620. The jury may in such cases reduce the damages to a nominal sum. Commercial Gazette Co. v. Healey,

the truth of the charge is relied on as a defense, the particulars must be alleged;¹ and it must also be shown that it was accompanied with the intent imputed.² An answer, however, pleading the truth in justification, which relates only to parts of a publication, is insufficient, unless pleaded specifically as a partial defense. The justification should be as broad as the charge, and should relate to the identical charge attempted to be justified.³ Where the words charge a crime, a defendant pleading the truth thereof need not prove it beyond a reasonable doubt.⁴ Where the charge in the petition is sought to be justified, it is incumbent upon the defendant to specially plead all the facts constituting the justification,⁵ and he must also admit the speaking of the words charged.⁶ A justification should not be broader than the charge, and it need go no further than to justify so much of the defamatory matter as is actionable.⁷ It is held by some courts that a plea of justification in slander, if not fully sustained by proof, is of itself an aggravation of damages.⁸ But in Ohio and other states the doctrine is adopted that the truth of the words spoken, pleaded in good faith under an honest belief in their truth, and with reasonable ground therefor, will not entitle the plaintiff to exemplary damages in case of failure to sustain the same.⁹

Under a general denial matter in mitigation only and not in bar may be given in evidence.¹⁰ So where the words con-

21 W. L. B. 93; *Van Derveer v. Sutphin*, 5 O. S. 298; *Halstead v. Schempp*, 6 W. L. B. 271.

¹ *Robinson v. Hatch*, 55 How. Pr. 55. See *Commercial Gazette Co. v. Healy*, 21 W. L. B. 93.

² *Gage v. Robinson*, 12 O. 250.

³ *Sawyer v. Bennett*, 20 N. Y. S. 45; s. c., 20 N. Y. S. 835; *Townshend, S. & L.* (3d ed.), sec. 312, and cases cited; *Fero v. Roscoe*, 4 N. Y. 162.

⁴ *Bell v. McGinness*, 40 O. S. 204.

⁵ *Duval v. Davey*, 32 O. S. 604; *Sunman v. Brewin*, 52 Ind. 140; *Boaz v. Fate*, 43 Ind. 60.

⁶ *Davis v. Mathews*, 3 O. 257.

⁷ *Heilman v. Shanklin*, 60 Ind. 242; *Townshend, S. & L.*, sec. 313; *Wolf-*

ard v. Printing, etc. Co., 32 N. E. Rep. 929 (Ind., 1893).

⁸ *Fero v. Roscoe*, 4 N. Y. 162; *Wilson v. Nations*, 5 Yerger, 211; *Jack-son v. Stetson*, 15 Mass. 48; *Farley v. Rauch*, 8 W. & S. 556. If made in bad faith the jury may consider it.

⁹ *Rayner v. Kinney*, 14 O. S. 283; *Seeley v. Blair*, W. 688; *Distin v. Rose*, 69 N. Y. 122; *Klinck v. Colby*, 46 N. Y. 427.

¹⁰ *Smith v. Rodecap*, 5 Ind. App. 78; 31 N. E. Rep. 479 (1892); *Duval v. Davey*, 32 O. S. 604; *Swinney v. Nave*, 23 Ind. 178; *McCoy v. McCoy*, 106 Ind. 492; *Wilson v. Noonan*, 85 Wis. 321.

sisted in calling another a thief, it cannot be shown that they related to a transaction which was not of itself larceny,¹ or where the slander consists in imputing the want of chastity of a female, specific acts of intercourse cannot be given.² But a defendant charged with having spoken slanderous words against the wife of another may show under a general denial that the wife and an unmarried man had lived together alone in a house,³ or he may give in evidence any facts tending to show that he spoke the words under a mistaken construction placed upon the conduct, which was in fact no justification,⁴ or any particular facts calculated to have induced mistake or to have misled the party may be admitted.⁵ But it is no defense that a defendant did not intend to use the words in a libelous sense.⁶ A defendant in an action for libel may claim the privilege of being excused from answering interrogatories if his answers would criminate himself.⁷ In an action of libel upon a publication charging a person with crime, it cannot be set up by way of defense that the matters complained of were published by a proprietor of a newspaper in his capacity of journalist, concerning the conduct of a public officer, upon information and with an honest belief in their truth.⁸ A defendant who admits the publication of what is set forth in the petition should, by way of defense or mitigation, plead the remainder of the article, if it modifies what is set forth in the petition, in order to give it a meaning not libelous or less libelous than it appears to have, when it is severed from its context.⁹ That an article was published charging a person

¹ *Sherman v. Rogers*, 24 N. Y. S. 390 (1893).

² *Duval v. Davey*, 83 O. S. 604.

³ *Reynolds v. Tucker*, 6 O. 516; *Blue v. Hoke*, 8 W. L. M. 100.

⁴ *Haywood v. Foster*, 6 O. 88.

⁵ *Van Derveer v. Sutphin*, 5 O. S. 293.

⁶ *Van Ingen v. Newton*, 1 Dis. 458, 482. It is held that an answer to an allegation of intent or innuendo in the petition should deny the slanderous intent imputed to him in the use of words in order to raise a material issue. *Wilkin v. Tharp*, 55 Ia. 600. It is considered a good defense

if the accused uttered the words on the authority of another whose name he gave. *Sexton v. Todd*, W. 316; *Young v. Slemmons*, W. 604. But it is not a defense that a communication was privileged if it appears that the same was false and malicious. *How v. Bodman*, 1 Handy, 528.

⁷ *Globe Rolling Mill v. King*, 2 C. S. C. R. 21.

⁸ *Wahle v. Cincinnati Gazette Co.*, 4 W. L. B. 61.

⁹ *Blethen v. Stewart*, 41 Minn. 205; *Oleson v. Journal Printing Co.*, 47 Minn. 300.

with a crime upon information of others and without malice is no defense.¹ It is the well-settled doctrine that judges, counsel, parties and witnesses are absolutely exempted from liability for statements for which they would be liable if spoken elsewhere, if made in the progress of a cause, and are pertinent and material to the case.²

Sec. 765. Answer to charge of perjury.—

Defendant says that the plaintiff herein was a witness in a certain cause heard in the court of common pleas of — county, Ohio, being styled A. B., plaintiff, against C. D., defendant, numbered — on the dockets of said court. Defendant was duly sworn according to law and testified in said cause to the following matters material in said cause, to wit [*set testimony out, as:*]. Said defendant falsely and maliciously testified that [*state false testimony and follow with allegation of truth*].

Plaintiff therefore alleges that the words contained and set forth in said petition are true, and asks to be dismissed with his costs.

NOTE.—R. S., sec. 5094.

Sec. 766. Answer in mitigation of libel.—

[*Caption.*]

Defendant says that said supposed libelous article was, on the — day of —, 18—, published in the —, a newspaper published in the city of —, state of Illinois, and was afterwards copied and published by the defendant as a matter of public news, the defendant believing the same to be true, and the same was not published maliciously nor with intent to injure the plaintiff.

NOTE.—While this is not a defense it may be shown in mitigation of damages. See R. S., sec. 5094.

Sec. 767. Answer claiming justification.—

Defendant admits uttering the words set forth in the petition, but avers that the same are true; [*or add:*] that before the supposed defamatory words were uttered, to wit, on or about the — day of —, 18—, the plaintiff did feloniously steal [*name property stolen*], the property of this defendant, of the value of \$—.

NOTE.—R. S., sec. 5094.

¹ Heyler v. N. Y. News Pub. Co., Coolidge, 121 Mass. 393; White v. 24 N. Y. S. 499 (1893). Carroll, 42 N. Y. 161; Smith v. How-

² Emerman v. Bruder, 5 O. N. P. ard, 28 Ia. 51; Barnes v. McCrate, 31; Life v. Gastner, 42 O. S. 634. 32 Me. 442; Hoar v. Wood, 3 Met. See ante, sec. 751. p. 723; Rice v. 193; Childs v. Voris, 4 N. P. 67.

Sec. 768. Answer of want of chastity.—

[*Caption.*]

Defendant admits that he spoke the words alleged in the petition, but says that on the — day of —, 18—, the plaintiff committed adultery with one R. F., who was not her husband; defendant therefore says the words charged in the petition are true, and asks to be dismissed.

NOTE.—R. S., sec. 5094. Specific acts to be shown must be pleaded. *Duval v. Davey*, 83 O. S. 604. The general reputation of plaintiff for chastity may be shown. *Id.*; *Foulkard's Starkie on Slander*, secs. 714, 539; *Turner v. Foxall*, 3 Cranch C. C. 824. It may be shown under the general issue that the plaintiff and married man had lived together alone in one house. *Reynolds v. Tucker*, 6 O. S. 517. If there is evidence of want of chastity, it is error to refuse to charge that, if she "was a woman of disparaged reputation, then that must be taken into consideration," unless some equivalent instruction is given. *Nellis v. Cramer*, 56 N. W. Rep. 911 (Wis., 1893).

Sec. 769. Answer that defamatory matter was printed as part of judicial proceedings.—

Defendant says that on the — day of —, 18—, there was pending in the court of common pleas of — county, Ohio, a certain action entitled —.

That during the progress of said cause one E. F., who was the attorney in said cause for the plaintiff C. D., made an argument which the defendant published in his paper as part of the judicial proceedings of said action, and that said publication was not made with any malicious intent, nor did defendant endeavor thereby to injure the character or reputation of plaintiff.

NOTE.—Mitigating circumstances may be shown. R. S., sec. 5094. Testimony of a witness in court is generally privileged. *Hutchinson v. Lewis*, 75 Ind. 55; 20 W. L. B. 186. It is no defense that the slanderous words were merely repeated, as malice may be evinced in circulating slanderous reports as well as in originating them. *Fowler v. Chichester*, 26 O. S. 14; *Haines v. Welling*, 7 Oh. 253; *Post Pub. Co. v. Molony*, 50 O. S. 89.

CHAPTER 55.

LIENS.

Sec. 770. Mechanic's lien — Parties.	Sec. 774. Mechanic's lien — The answer.
771. Mechanic's lien — Petition to enforce.	775. Forms of answers.
772. Petition by contractor to foreclose mechanic's lien against owner.	776. Vendor's lien.
772a. Petition by subcontractor to foreclose lien against owner.	777. Petition to enforce vendor's lien.
773. Petition to foreclose lien on railroad.	778. Petition by judgment creditor to marshal liens.
	779. Petition to marshal liens where prior lienholder has lien on other property.

Sec. 770. Mechanic's lien — Parties.— The statutory lien of a mechanic or material-man is assignable, and the assignee thereof may in his own name maintain an action for its enforcement.¹ A petition to foreclose a lien may be sustained by two persons who have performed labor or furnished material for their common benefit in the erection of a house upon the land of another.² It is not necessary in all cases to join the contractor as a party plaintiff.³ Contractors are proper parties to an action by material-men to enforce their liens, though not necessary parties.⁴ They are not necessary parties to an action where the lien sought to be enforced is for materials furnished after they have abandoned their contract.⁵ A subsequent purchaser or incumbrancer is a proper party to an action brought to enforce a specific lien for material.⁶ Nor is a prior lienholder a necessary party unless the plaintiff seeks to impeach or set aside the lien held by such prior holder or claims priority over it.⁷

¹ *Tuttle v. Howel*, 14 Minn. 145; *Rogers v. Hotel Co.*, 4 Neb. 54. And the assignment of the account carries with it the lien. *Ritter v. Stevens*, 7 Cal. 888.

² *Rockwood v. Walcott*, 3 Allen, 458. 699.

³ *Goffs v. Papin*, 84 Mo. 177.

⁴ *Yaucy v. Morton*, 94 Cal. 558.

⁵ *Green v. Clifford*, 94 Cal. 49.

⁶ *Rice v. Hall*, 41 Wis. 458.

⁷ *Sullivan v. Decker*, 1 E. D. Smith,

Sec. 771. Mechanic's lien — Petition to enforce.— In an action to recover under the lien law it is important that the petition should show a compliance with all the particulars specified by statute as essential in obtaining a lien thereunder.¹ It being a creature of statute, one seeking to avail himself of it must strictly comply with its terms.² It should be averred that the times for delivery, performance and payment are within the several periods named in the statute.³ The petition should also contain a specific allegation that the materials were furnished for the particular building against which the lien is sought to be enforced.⁴ And where the work was performed and material furnished under contract with the owner of the premises, the petition must aver that fact, setting forth the terms and facts sufficient to create a lien.⁵ If the contract provides that the certificate of the architect shall be conclusive evidence of the builder's right to final judgment, which is produced and not impeached, there is no reason to deny foreclosure of the lien.⁶ It must also be shown that the contract was made with some one having an estate or interest in the land,⁷ and that the defendant is the owner of the property;⁸ and a description of the premises, with a statement that the materials were furnished and labor performed on account of the owner, must be given.⁹ An action to enforce a mechanic's lien and to charge the estate with an incumbrance is in the nature of a proceeding *in rem* as well as a personal action.¹⁰ The holder of a lien may therefore bring a separate action to obtain personal judgment upon his account, in which case the lien is continued until the action is determined and

¹ Chapman v. Rannefels, 2 W. L. M. 142; Railway Co. v. Cronin, 88 O. S. 123; Railroad Co. v. McKay, 80 Ark. 682; Kechler v. Stumme, 80 N. Y. Super. 387; Cronkright v. Thompson, 1 E. D. Smith, 661; Foster v. Poillon, 2 E. D. Smith, 556.

² Hoffman v. Walton, 86 Mo. 613-615.

³ Cook v. Rofinot, 21 Ill. 487.

⁴ Crawford v. Crocket, 55 Ind. 220; Crawfordsville v. Barr, 45 Ind. 258; Hill v. Braden, 54 Ind. 72; Craw-

fordsville v. Brundige, 57 Ind. 262; Crawfordsville v. Lockhart, 58 Ind. 477; Hill v. Sloan, 59 Ind. 181; Ogg v. Tate, 52 Ind. 159.

⁵ Chapman v. Bolten Steel Co., 4 O. C. C. 242. See Rockel & White's Ohio Lien Laws, p. 166.

⁶ Snaith v. Smith, 25 N. Y. S. 513.

⁷ Porter v. Tooke, 85 Mo. 107; Clark v. Raymond, 27 Mich. 456.

⁸ Hicks v. Murray, 48 Cal. 515.

⁹ Shaw v. Allen, 24 Wis. 563.

¹⁰ Shaw v. Allen, 24 Wis. 563.

judgment satisfied;¹ and a personal judgment may be rendered against the defendant even though the plaintiff fails to establish his lien.²

The petition by a subcontractor³ must show that the labor and material were furnished; that the claim was filed as required by statute;⁴ that it is not disputed, or, if disputed, that it was settled by arbitration, and that subsequent to so filing his claim a payment fell due from the owner to the head contractor, and that the owner did not pay his claim when the payment fell due or within ten days thereafter, and subsequent to the expiration of the ten days he took the necessary steps to obtain the lien.⁵ The remedy by an action for money had and received is the only one as between a subcontractor and the owner.⁶ A judgment cannot be rendered against an owner personally for work or materials furnished to a contractor.⁷ The holder of a lien cannot have an erroneous statement as to the time when the first material was furnished corrected in the action, so as to bring it ahead of a mortgage.⁸ The amount of land which may be made subject to a lien is an issuable fact which may be determined under appropriate averments.⁹ Where a plaintiff in an action to enforce a mechanic's lien is also the assignee of several other lienholders, it is necessary to state the cause of action upon each in a separate count.¹⁰

Sec. 772. Petition by contractor to foreclose mechanic's lien against owner.—

1. Plaintiff says there is due him from the defendant the sum of \$—— with interest from the —— day of ——, 18—,

¹ Ambrose v. Woodmansee, 27 O. S. 146.

² Haight v. Church, 6 Kan. 192. Where personal judgment and the enforcement of a mechanic's lien are asked, the case is not appealable. Mitchell v. Drake, 7 O. C. C. 308. A right to trial by jury upon the question of fact arises on a counter-claim for damages. Deeves v. Met. Realty Co., 26 N. Y. S. 28.

³ R. S., sec. 3202.

⁴ R. S., sec. 3193.

⁵ Watkins v. Shaw, 7 O. C. C. 415.

See Rockel's & White's Ohio Lien Laws, p. 166.

⁶ Dunn v. Kanmacher, 26 O. S. 497. See Stephens v. Stock Yard Co., 29 O. S. 227.

⁷ Cronkright v. Thompson, 1 E. D. Smith, 661.

⁸ Wetmore v. Royal, 56 N. W. Rep. 594 (Minn., 1893).

⁹ Williamette S. M. Co. v. Kremer, 94 Cal. 205. As to setting aside a lien for loose description, consult this case and cases cited therein.

¹⁰ Green v. Clifford, 94 Cal. 49.

on an account of which the following is a copy with all credits and indorsements thereon, to wit: [*Copy account.*]

2. Plaintiff refers to and adopts so much of the first cause of action as is contained between the word "—" in the first line to and including the words "—" in the — line thereof as if here fully rewritten, and says: That the items contained in said account were for work done and materials furnished by said plaintiff to said defendant at his request for the construction [*or, if for altering or repairing, so state*] of a dwelling-house on lot — in the city of C., — county, Ohio, of which the defendant was the owner, at the various dates stated in said account.

Plaintiff further says that on the — day of —, 18—, within four months from the time of performing such labor and furnishing such material, he filed with the recorder of F. — county, Ohio, an affidavit containing an itemized statement and value of said labor and materials with all credits and indorsements thereon, together with the time when said account should have been paid, and a description of the premises upon which said building was constructed, which said affidavit was by said recorder recorded in volume —, page —, in the records of liens in said county. Plaintiff's claim therefore became a valid and subsisting lien on said building from the — day of —, 18—, the date when said labor was commenced and said materials furnished. The sum of \$—, with interest at — per cent. from the — day of —, 18—, now remains due and unpaid upon said account.

Plaintiff therefore prays for judgment for said sum of \$— and interest aforesaid, and that his said claim be declared a lien on said premises; that the same be ordered sold and the proceeds arising therefrom be applied to the payment of plaintiff's claim, and for all proper and equitable relief.

NOTE.—Property subject to lien. R. S., sec. 3184, as amended, 91 O. L. 185. Lien, how obtained. R. S., sec. 3185. Filing of statement by subcontractor, etc. R. S., sec. 3188, 91 O. L. 186. Filing statement with recorder. R. S., sec. 3195, 91 O. L. 186; Rockel & White's Ohio Lien Law, pp. 54, 55.

Priority of liens — Mortgages.—The lien dates from commencement of labor or of furnishing materials. *Choteau v. Thompson*, 2 O. S. 114. And from the first item of account. *Woodman v. Richardson*, 1 O. C. C. 191. There is no priority between lienholders irrespective of date of filing, but the lien precedes a mortgage filed subsequent to the date of furnishing materials, even though the lien be filed after the mortgage. *Choteau v. Thompson*, 2 O. S. 114. But where a mortgage takes effect after the commencement of one lien, but before the commencement of others, the latter must be postponed to the mortgage lien. *Hazard v. Loomis*, 2 Disn. 544. The principle that he who is first in time is better in right applies to subcontractors. *McCullom v. Richardson*, 2 Handy, 275. Where liens are obtained by persons performing labor, or furnishing machinery or material, and by an original contractor, the lien of the latter is postponed to that of the former, who have no priority among themselves. R. S., sec. 3188, Am. 91 O. L. 185. Lien on leased premises. *Hart v. Iron Works*, 37 O. S. 75. Mistake in description of premises will not estop the lienholder from claiming property as against a

mortgage. *Pedretti v. Stichtenoeth*, 6 O. C. C. 516. As to securing a lien for an entire job, see *Davis v. Hines*, 6 O. S. 473.

Subcontractor.—For form of petition of subcontractor or material-man, see *White & Rockel's Lien Law*, pp. 170, 171.

Sec. 772a. The mechanic's lien law.—The Ohio mechanic's lien law, the act of April 13, 1894,¹ in so far as it gives a lien on the property of the owner to subcontractors, laborers and those who furnish machinery, material or tile to the contractor, has been declared unconstitutional and void.² Since the pronouncement of this decision by the supreme court, the lower courts have uniformly held that the whole purpose of the law having failed, the repealing clause was of no effect, and that therefore the mechanic's lien law as it existed prior to the passage of the unconstitutional act was revived, and that the rights of the parties must be worked out under that law.³

If this be correct, subcontractors must look to the fund in the hands of the owner, as provided by the mechanic's lien law before the amendatory statute was passed.

Sec. 773. Petition to foreclose lien on railroad.—

1. That on the — day of —, 18—, the defendant was the owner in fee-simple of a right of way for a railroad extending from the city of —, in the state of —, through the following counties of the state of Ohio, to wit: [*name the counties*], to the city of —, in the state of —.

That on said day the plaintiff was employed by the defendant to grade, build embankments and make excavations for the track of a railroad upon said right of way from the city of —, in the state of Ohio, to the city of —, in the state of Ohio, a distance of — miles, and which part of said right of way lay within the counties of — and —, in said state [and also was employed by the defendant to build and furnish the material for all bridges, trestle-work and works of masonry necessary for said part of said track on said right of way between said cities of — and —], at and for the sum of —

¹ 91 O. L. 135.

Whitney v. Gill, 15 Oh. Dec. 648;

² *Palmer v. Tingle*, 55 O. S. 423.

Blair Brick Co. v. Walz, 15 O. C. C.

³ *Van Cleve Glass Co. v. Wame-* 718; *Brush Elec. Co. v. W. Elec.*

link, 6 Oh. Dec. 521; *Gormon v. Co.*, 4 O. N. P. 279.

Bepler, 7 Oh. Dec. 15; 4 N. P. 241;

dollars [a copy of which said contract is hereto attached, marked "Exhibit A."]

That the plaintiff performed said contract, in all respects performing all the conditions thereof, and furnished all the materials and completed said work on the — day of —, 18—, and the sum of — dollars, with interest from the — day of —, 18—, now remains due and unpaid on said contract.

Second cause of action. [Formal averments.] That on the — day of —, 18—, and within forty days from the time of completing said work and furnishing said materials, he filed in the recorder's office of said — county, where said labor was performed and said material furnished, an affidavit containing an itemized statement of the labor performed, and the kind and amount of materials furnished, with the amounts charged for each item, with all credits and payments thereon, which said affidavit and lien was recorded in vol. —, page —, Records of Liens of said county. That within ten days after filing said lien with the recorder of said county, he served a notice of such filing upon the secretary of said company.

Plaintiff's claim therefore became a valid and subsisting lien on said defendant's railroad on the — day of —, 18—.

Plaintiff therefore prays judgment against the defendant for the sum of — dollars with interest from the — day of —, 18—, and costs of suit, and that so much of the right of way of the defendant as lies within the state of Ohio be sold, and the proceeds thereof applied to the payment of said judgment, interest and costs, and for such other and further relief as may be just and equitable.

NOTE.—R. S., secs. 3207-3209; Rockel & White's Lien Laws, p. 191 et seq.

Sec. 774. Mechanic's lien — The answer.— A defendant in an action to foreclose a mechanic's lien may deny all knowledge of the furnishing of materials, or that notice was given of the lien, and may claim as a counter-claim that the lienholder guarantied that he would build the house in a workmanlike manner and complete it by a certain time, claiming damages for his failure so to do.¹ Where the petition alleges that the defendant has or claims an interest in the land which is subject to the lien, a general denial will not amount to a disclaimer of such interest, but only puts in issue the fact that it was subject to the lien.² It is a good defense by the owner that there were liens on the premises prior to that of the plaintiff, and exceeding the amount due from the owner.³ To

¹ *McAdow v. Ross*, 58 Mo. 199.

² *Elder v. Spinks*, 53 Cal. 293.

³ *Lehretter v. Coffman*, 1 E. D. Smith, 664.

entitle a person to a lien, the materials must be furnished or the labor performed within the state. Goods consigned from another state to a head contractor do not entitle the consignor to a lien for the goods so furnished by him to the head contractor as a material-man.¹ In an action against the owner to recover an amount due upon an account for labor performed in the construction of a building, and to have the same declared a lien thereon, where it is less than the balance unpaid or due upon the contract, the owner cannot be allowed to set off a claim against the contractor, not arising out of the contract, but which is acquired by him after the labor has been performed, although his claim is so acquired before notice that the mechanics had not been paid.² If labor be performed or material furnished with an understanding or agreement, either express or implied, that no lien will be asserted, then the right is waived, and a lien cannot be enforced against a subsequent purchaser or lienor.³ A lien will also be waived where a note is given and received as payment for the materials furnished,⁴ though not unless the note is in fact received as payment.⁵ In a controversy between a holder of a mechanic's lien and a mortgage, a note given before the taking out of the lien does not discharge the same, but only suspends its operation.⁶

Sec. 775. Forms of answers.—

[*Caption.*]

[*Payment.*]

That before the bringing of this action A. B., the contractor for the construction of said dwelling-house mentioned in the petition, and who contracted for the material of the plaintiff, fully paid the plaintiff therefor.

[*Or, when personal judgment is claimed:* That the defendant, prior to the filing of the plaintiff's notice of said lien, and without notice or knowledge of his claim, purchased said property from the defendant R. F. for the sum of — dollars, which he then paid.]

[*Or,* That this defendant is the owner in fee-simple of said land, receiving a deed therefor from said R. F. on the —

¹ Bendor v. Stettimier, 19 W. L. B. 163.

² Bursdorff v. Hardwey, 7 O. C. C. 378.

³ Bullock v. Horn, 44 O. S. 420.

⁴ Victoria Building Ass'n v. Kelly, 11 W. L. B. 33.

⁵ Iron Co. v. Murray, 88 O. S. 323.

⁶ Crooks v. Finney, 89 O. S. 57.

day of —, 18—, and before any part of said building was erected thereon, which deed was duly recorded in the recorder's office of said county on the — day of —, 18—.]

[Or, That after said material was furnished, and before the plaintiff's notice of lien was filed, this defendant purchased said property from the defendant R. F. for a valuable consideration, which he then paid in full.

That before purchasing said property this defendant applied to the plaintiff and stated to him that he was about to purchase the same, and requested to know whether he had or would make any claim against the same by way of mechanic's lien or otherwise, and the plaintiff then and there stated to this defendant that the materials furnished by him for said building had been fully paid for by U. V., the contractor; and that he had no claim on said property, and would make none.

That this defendant (was ignorant of the facts, and believed and relied upon said representations, and was) induced thereby to purchase said property and pay the cost therefor.

That said R. F., from whom this defendant purchased said property, is insolvent, and if this defendant is compelled to pay the plaintiff's claim he will lose the same.]

Sec. 776. Vendor's Lien.—The general rule is that a vendor's lien is purely personal and cannot be assigned or enforced by another.¹ It is founded upon an implied trust between the vendor and purchaser. The latter is held to be a trustee of the former, receiving the conveyance for the use of the vendor until the purchase-money is paid. This trust attaches to the land and follows it into the hands of any subsequent purchaser with notice.² But there are exceptions to the general rule that the lien cannot be enforced by one other than the vendor. Upon the death of the vendor it may be enforced by his personal representative. Creditors and legatees in marshaling the assets of the vendor may also enforce it, as well as a judgment creditor in an action to subject purchase-money due the latter to the payment of the judgment.³ The lien will not arise where the vendor takes security for the payment of the consideration,⁴ but is not affected or extinguished by taking a mortgage to secure the payment of the purchase-

¹ *Edwards v. Edwards*, 24 O. S. 403; *Brush v. Kingsley*, 14 O. 20; *Taylor v. Foote*, W. 856; *Jackman v. Hallock*, 1 O. 818; *Tiernan v. Beam*, 2 O. 833; *Williams v. Roberts*, 5 O. 85.

² *Jackman v. Hallock*, 1 O. 818.

³ *Edwards v. Edwards*, *supra*.

⁴ *Mayham v. Coombs*, 14 O. 428; *Williams v. Roberts*, 5 O. 85.

money.¹ A person advancing money to a purchaser to buy land cannot claim a vendor's lien.²

Sec. 777. Petition to enforce vendor's lien.—

That on the — day of —, 18—, the plaintiff was the owner in fee-simple of the following described real estate situated in the county of —, and state of Ohio, to wit: [*Describe premises.*] On said day plaintiff sold and conveyed said premises by deed of general warranty to the defendant, for the sum of \$—, of which sum said defendant paid plaintiff, at the time of the delivery of the deed, \$—, and made and executed his promissory note for the remainder thereof, to wit, the sum of \$—, which said note became due and payable on the — day of —, 18—.

That at the time said note became due the plaintiff requested payment thereof, which was refused, and no part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$—.

[That the defendant has no other property subject to execution.]

Plaintiff therefore prays judgment against the defendant for the sum of \$—, with interest thereon from the — day of —, 18—, and in case said defendant fails to pay said judgment by a day to be named by the court, that said premises may be sold, and so much of the proceeds as are required may be applied to the payment of said judgment.

Sec. 778. Petition by judgment creditor to marshal liens.

[*Caption.*]

1. Plaintiff says that on the — day of —, 18—, by the consideration of the court of common pleas of — county, Ohio, said plaintiff recovered a judgment against said defendants, P. M. W. and J. S., in the sum of \$—, with interest at the rate of — per cent. per annum from the — day of —, 18—, also his costs taxed at \$—, which judgment is wholly unsatisfied and unpaid.

2. And said plaintiff for second cause of action against said defendants, J. S. and P. M. W., says [*formal averments*] that on the — day of —, 18—, by the consideration of the court of common pleas of — county, Ohio, he recovered a judgment against said defendants, P. M. W. and J. S., in the sum of \$—, and also his costs therein taxed at \$—, which judgment is wholly unsatisfied and unpaid, and draws interest at the rate of — per cent. per annum from the — day of —, 18—.

And that on the — day of —, 18—, an execution was duly issued on said judgment of \$—, and, for want of goods

¹ Boos v. Ewing, 17 O. 500; Elliott v. Platter, 43 O. S. 198.

² Stansel v. Roberts, 18 O. 148.

and chattels of said defendants whereon to levy, was on the — day of —, 18—, duly levied on the following described real estate belonging to said P. M. W., which levy still subsists, situate in the county of, etc.: [*Description of real estate.*]

And that on the — day of —, 18—, an execution was duly issued on said judgment aforesaid, and, for want of personal property whereon to levy, was on said day duly levied on the following described real estate belonging to said defendant J. S., which levy still subsists, situate in the county of —: [*Description of real estate.*]

And that on the — day of —, 18—, an execution was duly issued on said judgments aforesaid, and, for want of goods and chattels whereon to levy, was on the same day duly levied on the following described real estate owned by P. M. W., which levy still subsists, situate in the county of — and state of Ohio, being in — township, bounded and described as follows, to wit: [*Description of real estate.*]

8. Plaintiff, for third cause of action against said defendant P. M. W., says: [*Formal averments.*] That there was duly levied according to law, on said first tract of land described in this petition, taxes for the years and amounts as follows: For the year 18—, \$—, etc. Which amounts were due and payable from the said P. M. W. as provided by law, and which amounts said defendant neglected and refused to pay, and allowed the same to become delinquent.

That a portion of said amounts was paid by D. F. B., and the lien as held by him was duly transferred to this plaintiff for a valuable consideration by said B., and that since said transfer said plaintiff has made the balance of payments due on said premises as taxes, and is now the legal and true holder of said tax lien, and that no part of the taxes, interest or penalties has been repaid him by said P. M. W.; and that interest, penalty and taxes on said tract now amount to the sum of \$—, and said plaintiff asks the court to decree the same to be the first and best lien upon said described premises.

Said plaintiff says that A. W., S. N. and W. S., defendants, claim to have some lien on the premises described in this petition, by reason of which claims said plaintiff is unable to effect a sale of said premises under execution.

Wherefore said plaintiff prays and asks that said claimants be compelled to set up their claims, if any they have in said property, or be forever barred, and that the court will adjust the *pro rata* thereof and of plaintiff's said liens, and that said real estate may be ordered sold and the proceeds distributed among the claimants according to law, and their *pro rata* as the same shall be settled by court.

S. & H.,
Plaintiff's Attorneys.

NOTE.—From *Harvout v. Willis*, error to circuit court of Ashland county, Supreme Court, unreported, No. 1806.

Sec. 779. Petition to marshal liens where prior lienholder has lien on other property.—

That on the — day of —, 18—, the plaintiff recovered a judgment in the — court of common pleas of — county, Ohio, against H. T. for the sum of \$—; that on the — day of —, 18—, an execution was issued on said judgment, and, for want of goods and chattels of said H. T. whereon to levy, was levied upon the following described real estate, to wit: [*describe premises*], as the property of said H. T.

That H. T., at that time, was doing business as a merchant at R., and on the day preceding that on which the judgment was rendered gave a mortgage on certain household goods to secure the payment of said sum.

That these mortgages were given as claimed by the defendants to secure them against the acceptance of two drafts, each for the sum of \$—, drawn on H. T. on said defendants in favor of H. & Co., of —, which drafts were drawn on the — day of —, 18—, and were due and payable on the — day of —, 18—, and to secure certain moneys amounting to the sum of \$— advanced by said defendants to H. T.

That on the — day of —, 18—, H. T. sold his stock of goods to — — for the sum of \$—, and, as part of the consideration therefor, received two notes, payable respectively in — and — months, which notes, on the — day of —, 18—, were by said H. T. assigned to the defendants as security for said debt.

That said H. T. then was and now is insolvent, as said defendants well knew; yet on or about the — day of —, 18—, and since the levy of said execution, said defendants, for the purpose of defrauding the plaintiff by depriving him of his lien on said land, fraudulently redelivered to said H. T. said promissory notes.

That the personal property of said H. T. mortgaged to said defendants is of the value of \$—, and said notes redelivered by them to H. T. were of the value of \$—, being more than sufficient to satisfy the claim of the defendants against said H. T., and the premises levied upon under the execution of the plaintiff are not more than sufficient to satisfy the plaintiff's judgment.

Plaintiff therefore prays that, inasmuch as the defendants have a security upon two funds, they may be required to apply said personal property so secured by mortgage and said notes to the payment of their claim, and that said real estate be subjected to the plaintiff's lien alone, and applied to satisfy the same, and for such other relief as justice may require.

NOTE.—Based on *Fassett v. Traber*, 20 O. 540.

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CHAPTER 56.

MALICIOUS PROSECUTION.

<p>Sec. 780. Malicious prosecution—The petition.</p> <p>781. Petition for maliciously causing a person to be indicted.</p> <p>782. Petition for malicious civil suit before justice.</p>	<p>Sec. 783. Petition for malicious criminal prosecution before justice.</p> <p>784. Petition for malicious attachment.</p> <p>785. Malicious prosecution—The answer.</p>
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Sec. 780. Malicious prosecution — The petition.— An action for malicious prosecution abates upon the death of either party.¹ Two or more persons cannot unite in a joint action for malicious prosecution.² The action generally lies for the prosecution of a criminal action; and while there are authorities which hold that an action will not lie for maliciously and without probable cause prosecuting a mere civil action,³ the modern settled American doctrine is, that an action for the malicious prosecution of a civil action may be maintained whenever the defendant therein has been deprived of his personal liberty, or of the possession or enjoyment of property.⁴ It will lie for maliciously and without probable cause prosecuting an action of forcible entry and detainer,⁵ as well as for

¹ O. Code, sec. 5144.

² *Rhodes v. Booth*, 14 Ia. 575.

³ 2 Addison on Torts, 752; *Ely v. Davis*, 111 N. C. 24-26; *O'Neill v. Johnson*, 55 N. W. Rep. 601 (Minn., 1893); *McPherson v. Runyon*, 41 Minn. 524; 43 N. W. Rep. 392; *Rachelman v. Skinner*, 46 Minn. 196; 48 N. W. Rep. 776.

⁴ *Newark v. Upson*, 40 O. S. 17; *Newell on Mal. Pros.*, p. 82, sec. 23, and cases cited, and pp. 85, 86; *Pope v. Pollock*, 46 O. S. 867; *Whipple v. Fuller*, 11 Conn. 581; *Closon v. Staples*, 42 Vt. 209; *Coxe v. Taylor*, 10 B. Mon. 17; *Vanduzor v. Linder-*

man, 10 Johns. 106; *White v. Dingley*, 4 Mass. 483; *O'Neill v. Johnson*, 55 N. W. Rep. 601 (Minn., 1893); *McPherson v. Runyon*, 41 Minn. 524; s. c., 43 N. W. Rep. 392; *Burton v. Railway Co.*, 33 Minn. 189; s. c., 22 N. W. Rep. 300; *Rachelman v. Skinner*, 46 Minn. 196; s. c., 48 N. W. Rep. 776; *Dempsey v. Lepp*, 52 How. Pr. 11; *Lawton v. Green*, 64 N. Y. 331. It will lie if unaccompanied by arrest or seizure of property. *Springer v. Wise*, 3 Dian. 391. See *Boone on Pldg.*, sec. 167, note 27.

⁵ *Pope v. Pollock*, 46 O. S. 867.

procuring an attachment auxiliary to a civil action, maliciously and without probable cause, even though there be a just debt; and it is not necessary to aver that the attachment has been discharged or otherwise terminated adversely to the party employing its aid.¹ And a suit will lie for instituting an action in replevin and taking goods therein,² or for the malicious institution of an inquest of lunacy against another.³

The action will lie against one who maliciously and without probable cause procures the arrest of a person upon a criminal charge,⁴ though, to render the person making the complaint liable, it must be alleged that his conduct was inspired by malicious motives, and was without probable cause, or a statement of facts must be made, which, if proved, will establish a want of probable cause.⁵ An allegation of the falsity

¹ Fortman v. Rottier, 8 O. S. 548; Sperry v. Warner, 9 O. 108; King v. Montgomery, 50 Cal. 115; Tomlinson v. Warner, 9 O. 104; Weatherell v. Springley, 48 Ia. 41; Beyersdorf v. Sump, 89 Minn. 495.

² Brownstein v. Lahlein, 20 N. Y. S. 213.

³ Lockenour v. Sides, 57 Ind. 360.

⁴ Search-warrant: Oleson v. Tvete, 46 Minn. 225; Carey v. Sheets, 67 Ind. 375; Whitsome v. May, 71 Ind. 269; Miller v. Brown, 3 Mo. 127. Bastardy proceedings: Coffey v. Myers, 84 Ind. 105.

⁵ Dreyfus v. Aul, 29 Neb. 191; s. c., 45 N. W. Rep. 282; Vennum v. Huston, 56 N. W. Rep. 970 (Neb., 1893); Crane v. Buchanan, 80 W. L. B. 120; Benjamin v. Garee, W. 450; Burnett v. Nicholson, 79 N. C. 548; Barfield v. Turner, 101 U. S. 357; Ely v. Davis, 111 N. C. 24; Anderson v. Buchanan, W. 725; Dennehey v. Woodsum, 100 Mass. 195. Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that a person accused is guilty of the offense of which he is charged. Anderson

v. Howe, 116 N. Y. 336; Carl v. Ayers, 53 N. Y. 14; Johnson v. Corrigan, 3 W. L. B. 1140. The finding of a magistrate that an offense has been committed, and that there was probable cause to believe the defendant guilty, is only *prima facie* evidence of probable cause in an action for malicious prosecution. Roes v. Hixon, 46 Kan. 550; 26 Am. St. Rep. 123. See, also, Newell on Mal. Pros., secs. 9, 10; Newman v. Davis, 58 Iowa, 447; Bauer v. Clay, 8 Kan. 389; Sweeny v. Perney, 40 Kan. 102. It is well settled that a private corporation is liable for malicious prosecution. Morton v. Insurance Co., 103 N. Y. 645; Bank v. Graham, 100 U. S. 699; Railway Co. v. Harris, 122 U. S. 597; Reed v. Bank, 130 Mass. 443; Jordon v. Railroad Co., 74 Ala. 85; Carter v. Machine Co., 51 Md. 290; Williams v. Insurance Co., 57 Miss. 759. In an action for malicious prosecution evidence as to the plaintiff's good reputation and the defendant's knowledge thereof may be given for the purpose of showing want of probable cause. Funk v. Amor, 4 O. C. C. 271.

of the charge is not equivalent to an averment of the want of probable cause.¹ The petition need not allege that the defendant falsely, as well as maliciously and without probable cause, made the accusation.² Nor is it always essential to allege that a warrant was issued—the averment that the affidavit was made and filed maliciously and without probable cause being sufficient.³ Malice is a fact to be pleaded, and in doing so it is improper to set forth the evidence necessary to establish it.⁴

An action for maliciously and without probable cause suing out a writ of attachment need not allege the termination of such suit.⁵ But to sustain an action for the malicious prosecution of a criminal charge, it must be shown that the prosecution has ended, for the reason that until so terminated it can not be known that the accused will not be convicted.⁶ Upon the question as to what will amount to such a termination the authorities are not in entire harmony. It is not essential that the plaintiff shall have been acquitted of the charge on a trial of the merits; the entry of a *nolle prosequi*, followed by his discharge, is sufficient.* Mere omission to prosecute will not of itself furnish sufficient foundation for an action. But where there has been a voluntary discontinuance, the defendant in the action for malicious prosecution must show the necessity for causing the arrest.⁷ Where the proceedings were had before a court having no jurisdiction, the remedy is for false imprisonment and not malicious prosecution.⁸ And a cause of action for malicious prosecution may be changed to one for false imprisonment by striking out the averment of “want of probable cause,” and alleging that the arrest was “illegally made with force.”⁹

¹ *Scotten v. Longfellow*, 40 Ind. 23.

² *Ziegler v. Powell*, 54 Ind. 178.

³ *Coffey v. Myers*, 84 Ind. 105; *Buston v. Biddle*, 48 Ind. 515; *McCarthy v. Kitchen*, 59 Ind. 500.

⁴ *O'Neill v. Johnson*, 55 N. W. Rep. 601 (Minn., 1898); *White v. Tucker*, 16 O. S. 468; *Hahn v. Schmidt*, 64 Cal. 284; *Thaule v. Krekeler*, 81 N. Y. 428.

⁵ *Fortman v. Rottier*, 8 O. S. 548.

⁶ *Fortman v. Rottier*, 8 O. S. 550; *Douglas v. Allen*, 56 O. S. 156; *Sayles v. Briggs*, 4 Met. 421; *Stone v. Crocker*, 24 Pick. 87; *Parker v. Farley*, 10 Cush. 279; *Crane v. Buchanan*, 80 W. L. B. 120; *Benjamin v. Garee*, W. 450; *Anderson v. Buchanan*, W. 725; *Wheeler v. Nesbitt*, 24 How. Pr. 544; *Bessen v. Southern*,

10 N. Y. 236; *Heyne v. Blair*, 63 N. Y. 19; *Thaule v. Krekeler*, 81 N. Y. 428; *Anderson v. Howe*, 116 N. Y. 336; *Merriam v. Morgan*, 7 Oreg. 68. Termination is sufficiently shown if it appears that no further proceeding can be taken. *Robbins v. Robbins*, 183 N. Y. 597. *Contra*, *Hayes v. Blizzend*, 80 Ind. 457; *Gorrell v. Snow*, 81 Ind. 215; *McCulloch v. Rice*, 59 Ind. 580; *Atwood v. Beirne*, 26 N. Y. S. 149.

⁷ *Burnhans v. Sanford*, 19 Wend. 417; *Gilbert v. Emmons*, 42 Ill. 143; *Kinsey v. Wallace*, 36 Cal. 462.

⁸ *Painter v. Ives*, 4 Neb. 123; *Bixby v. Brundridge*, 2 Gray, 129; *Marshall v. Betner*, 17 Ala. 832.

⁹ *Spice v. Steinruck*, 14 O. S. 218.

* *Douglas v. Allen*, 56 O. S. 156.

In an action for malicious prosecution the plaintiff may show his good reputation as a peaceable and quiet citizen.¹ A petition which states that the defendant without cause falsely and maliciously made a complaint before a magistrate charging the plaintiff with embezzling letters intrusted to his care as mail-carrier, and procured a warrant to be issued for his arrest, upon which charge he was tried and acquitted, states a good cause of action.²

Sec. 781. Petition for maliciously causing a person to be indicted.—

Plaintiff states that on the — day of —, 18—, the defendant appeared before the grand jury sitting at the — term of 18— of the court of common pleas of — county, Ohio, and then and there wilfully and maliciously, and without probable cause, gave and furnished to said grand jury certain false information against plaintiff, and thereby maliciously, and without probable cause, caused and procured plaintiff to be by said grand jury indicted for the offense of [*state offense*].

That defendant did further wickedly, maliciously, and without probable cause, prosecute and assist in the prosecution of plaintiff upon the indictment so rendered by said grand jury against him at the — term of said court, —, 18—.

That plaintiff was by the malicious and wilful conduct of defendant compelled to defend himself against said false charge so made in the indictment against him, and said plaintiff was tried upon said charge of — according to due course of law by a jury of said county, and was by said jury on the — day of —, 18—, duly acquitted of the said charge so made against him.

That by reason of the premises plaintiff was compelled to expend large sums of money in employing counsel and in defending himself against said charge, to wit, the sum of \$—, and was by reason of said charge imprisoned in the county jail of said county for the period of —, and was by reason of said imprisonment and of said trial prevented from transacting his business, and otherwise injured in reputation, in the sum of \$—, for which he asks judgment against said defendant.

Sec. 782. Petition for malicious civil suit before justice.

[*Caption and formal averments.*]

That on the — day of —, 18—, the said defendant, without just and probable cause of action against plaintiff, did wrongfully, wilfully and maliciously cause plaintiff to be sum-

¹ Funk v. Amor, 7 O. C. C. 419; ² Tilton v. Morgaridge, 12 O. S. 98.
2 O. C. C. 271.

moned to appear before F. G., Esq., one of the justices of, etc., to answer [*state action*].

That on the — day of —, 18—, when said cause came on for hearing, plaintiff appeared before said justice but said defendant did not appear, but suffered said cause to go by default, and the same was dismissed by said justice for want of prosecution, and because said defendant had no cause of action against this plaintiff, as he well knew.

That plaintiff was compelled to and did pay the sum of \$— for necessary traveling expenses, and the sum of \$— for retaining counsel in said cause.

That plaintiff has therefore sustained damages by reason of the wrongful and malicious conduct of said defendant herein stated, in the sum of \$—, for which he asks judgment.

Sec. 783. Petition for malicious criminal prosecution before justice.—

[*Caption and formal averments.*]

That on the — day —, 18—, said defendant falsely and maliciously, and without reasonable or probable cause therefor, filed an affidavit against the plaintiff before R. L., a justice of the peace of —, county of —, Ohio, charging him with [*state offense in the words of the affidavit*], and thereupon caused said justice to issue a warrant for the arrest of plaintiff, and falsely and maliciously, and without probable cause therefor, caused plaintiff to be arrested on said charge so made by defendant, and to be imprisoned in the jail of — county for the period of — days then next following.

That said cause was on the — day of —, 18—, duly heard and tried by said justice, and said defendant was acquitted and discharged of said crime so made against him, and said prosecution is now ended.

That by reason of the premises plaintiff has been greatly injured [*state extent of injury*], and has been compelled to expend the sum of \$— in defending himself against said charge, and has sustained damages in the sum of \$—.

NOTE.— A justice in deciding upon the sufficiency of a complaint and causing the arrest acts judicially. *Vennum v. Huston*, 56 N. W. Rep. 970 (Neb., 1893). A prosecuting witness is not liable unless he acted maliciously and without probable cause. *Dreyfus v. Aul*, 29 Neb. 191; *Vennum v. Huston*, *supra*.

Sec. 784. Petition for malicious attachment.—

[*Caption and formal averments.*]

On the — day of —, 18—, defendant maliciously and without probable cause filed an affidavit before A. B., a justice of the peace in — township, in the county of —, Ohio, for the purpose of obtaining an attachment against the goods and chattels of plaintiff, charging in said affidavit that [*here state the ground for attachment contained in the affidavit*].

That thereupon, upon said false and malicious affidavit so made and filed by said defendant, the said A. B., justice of the peace, issued a writ of attachment and placed the same in the hands of a constable, and plaintiff's goods and chattels were wrongfully taken from the possession of plaintiff.

Thereafter said goods were by due course of law sold and were wholly lost to plaintiff.

That the ground stated in said affidavit, upon which said attachment was sued out, was false in this [*state how*].

That by reason of the premises plaintiff has sustained damages [*state damages*].

[*Prayer.*]

Sec. 785. Malicious prosecution—The answer.—It matters not how malicious the motives of a defendant were in prosecuting a person on a criminal charge, if there is reasonable cause to believe him guilty.¹ Malice and want of probable cause being ingredients of the plaintiff's case, a general denial is therefore sufficient to enable the defendant to put in evidence such facts as show the presence of probable cause and absence of malice, as that he acted upon the advice of counsel.² It is generally held that a defendant may show that in making a complaint he acted upon the advice of the magistrate and is thereby protected from liability.³ He may show that at the time he made the complaint he stated all the facts upon which it was based, and that upon the assurance of the magistrate that a crime had been committed he instituted the

¹Sanders v. Palmer, 55 Fed. Rep. 217; Green v. Cochran, 43 Ia. 544.

²Folger v. Washburn, 137 Mass. 60; Sparling v. Conway, 75 Mo. 510; White v. Tucker, 16 O. S. 468; Hunter v. Mathis, 40 Ind. 356; Rost v. Harris, 13 Abb. Pr. 446. See John v. Bridgman, 27 O. S. 22.

³Ash v. Marlow, 20 O. 119; Monaghan v. Cox, 155 Mass. 487; Olmstead v. Partridge, 16 Gray, 381; Allen v. Codman, 139 Mass. 186; Donnelly v. Daggett, 145 Mass. 314; Stewart v. Sonneborn, 98 U. S. 187; Bernar v. Dunlap, 94 Pa. St. 329; Cooney v. Chase, 81 Mich. 203; Wicker v.

Hotchkiss, 62 Ill. 107; Eastman v. Keasor, 44 N. H. 518; Paddock v. Watts, 116 Ind. 146. But this rule does not prevail where the counsel himself is interested. White v. Carr, 71 Me. 555. There are other authorities which hold that the advice of magistrates who are not counselors at law affords no protection. Strouse v. Young, 86 Md. 246; Coleman v. Hurick, 2 Mackey, 189; Brobst v. Ruff, 100 Pa. St. 91; Gee v. Culver, 12 Oreg. 228; Gilbertson v. Fuller, 40 Minn. 413; MacLeod v. MacLeod, 73 Ala. 42. See and compare Mark v. Hastings, 13 So. Rep. 297 (Ala., 1893).

prosecution.¹ He cannot be held liable for an affidavit as to facts which a magistrate erroneously believes constitute a crime.² A justice of the peace in deciding upon the sufficiency of a complaint acts judicially, and if he acts in good faith, without malice and within his jurisdiction, he cannot be held liable for errors of judgment.³

A person claiming protection because he acted upon advice of counsel or others must show that he acted in good faith, believing he had a good cause of action, and did not seek to procure information merely to shelter himself. He must show that he made a full and honest disclosure of all material facts within his knowledge or belief.⁴ If he purposely, carelessly or negligently failed to give such full statement, the advice of counsel will not afford protection.⁵ Nor will it shield a defendant where it appears that the prosecution was pursued for the sole purpose of enforcing the collection of a debt,⁶ or where he does not believe the accused guilty.⁷ A defendant may state such facts as will tend to show probable cause, and if he fails it should be taken advantage of by demurrer.⁸ To constitute a defense to an action for malicious prosecution, if the facts stated in the complaint do not constitute a crime, they must nevertheless be true.⁹ An answer claiming that an attachment was not sued out wrongfully, maliciously or vexatiously, or without reasonable or probable cause, presents a substantial defense to the action.¹⁰ A de-

¹ *White v. Tucker*, 16 O. S. 468.

² *Hahn v. Schmidt*, 64 Cal. 284.

³ *Vennum v. Huston*, 56 N. W. Rep. 970 (Neb., 1898).

⁴ *Ash v. Marlow*, 20 O. 119; *Wicker v. Hotchkiss*, 63 Ill. 107; *Monaghan v. Cox*, 155 Mass. 487; *Scotten v. Longfellow*, 40 Ind. 28. The adviser should be learned in the law and of such training and experience that he may safely be presumed to give wise and prudent counsel, and must act under a sense of responsibility. *Monaghan v. Cox*, 155 Mass. 487. See, also, *Smith v. Davis*, 8 Mont. 109; *Smith v. Walter*,

23 W. L. R. 880 (Pa., 1889); *Mark v. Hastings*, 18 So. Rep. 297; *Jordan v. Railroad Co.*, 81 Ala. 227; *Learid v. Davis*, 17 Ala. 27.

⁵ *Scotten v. Longfellow*, 40 Ind. 28.

⁶ *Neufuld v. Rodeninski*, 32 N. E. Rep. 913 (Ill., 1893).

⁷ *Johnson v. Miller*, 82 Ia. 693.

⁸ *Wilson v. Ferrari*, 1 Disn. 579.

⁹ *Dennis v. Ryan*, 63 Barb. 145; *Forrest v. Collier*, 20 Ala. 175; *Anderson v. Buchanan*, 8 Ind. 132; *Anderson v. Buchanan*, W. 725.

¹⁰ *Marshall v. Betner*, 17 Ala. 832.

fendant cannot be relieved upon the ground that the complaint in the criminal proceedings, for want of proper allegation, did not legally set out any criminal offense, when he attempted to accomplish such a purpose and did cause an arrest and trial.¹

¹ *Finn v. Frink*, 84 Me. 261; s. c., 4 Atl. Rep. 351.

CHAPTER 57.

MALPRACTICE.

Sec. 786. Malpractice — Statutory penalty.

786a. Malpractice — Against physician—Rules of liability.

786b. Malpractice—Pleading and procedure.

Sec. 787. Petition against physician.

788. Petition for damages against a surgeon.

789. Petition for malpractice in wrongfully diagnosing disease.

789a. Malpractice—the answer.

789b. Malpractice—attorneys.

Sec. 786. Malpractice—Statutory penalty.—A statutory penalty is prescribed for practicing medicine or surgery without the necessary qualifications;¹ and an empiric is liable to a civil action for damage as well as for the statutory penalty.² The remedy to enforce the statutory penalty is by a civil action in the name of the state.³

Sec. 786a. Malpractice—Against physician—Rules of liability.—The liability of a physician or surgeon for unskillful treatment may be based upon contract, express or implied, or merely upon tort, although some authority maintains that the action is one *ex delicto*.^{*} Malice, while it may exist, is not an element, and forms no part of a cause of action for this wrong.[†] Physicians and surgeons are required to use not the highest but ordinary skill and diligence. The implied liability, in the absence of an express contract as to compensation, extends no further than that he will indemnify his patient against injurious consequences resulting from his want of a proper degree of skill, care or diligence. He is liable if he is wanting in either.⁴ There can be no recovery for negligently reducing a fracture

¹ R. S., secs. 6992, 4403.

² *Musser v. Chase*, 29 O. S. 577.

³ *State v. Chandler*, 7 W. L. B. 97; R. S., sec. 2120.

⁴ *Craig v. Chambers*, 17 O. S. 253; *Peck v. Hutchinson*, 55 N. W. Rep. 511 (Ia., 1898); *O'Hara v. Wells*, 14 Neb. 408. The question of a physician's skill is a material one. *Carpenter v. Blake*, 50 N. Y. 696; *Hewitt v. Eisenbart*, 55 N. W. Rep. 252 (Neb., 1898); *Rowe v. Lent*, 17 N. Y. S. 131; *Becker v. Janiski*, 15 N. Y. S. 674; *Vanhoover v. Berghoff*, 90 Mo. 487; *Burnham v. Jackson*, 28 Pac. Rep. 250 (Colo., 1893); *Sanderson v. Holland*, 39 Mo. App. 334. In absence of contract, physicians and surgeons impliedly contract that they possess the

reasonable and ordinary qualifications of their profession. *Landon v. Humphrey*, 9 Conn. 209; *Kendall v. Brown*, 74 Ill. 281; *Small v. Howard*, 128 Mass. 181; *Ballou v. Prescott*, 64 Ma. 305; *Leighton v. Sargent*, 81 N. H. 119; *Ely v. Wilbur*, 49 N. J. Law, 635; 10 Atl. Rep. 335, 441; *Potter v. Warner*, 91 Pa. St. 362; *Hathorn v. Richmond*, 48 Vt. 557; *Gates v. Fleischer*, 67 Wis. 504; 80 N. W. Rep. 674. This skill is measured by the general line of practice. *Utley v. Burns*, 70 Ill. 169; *Almond v. Nugent*, 34 Ia. 300. Regard must be had for the advanced state of the profession. *Smother v. Hanks*, 34 Ia. 236; *Nelson v. Harrington*, 72 Wis. 591.

^{*} *Shuman v. Drayton*, 14 O. C. C. 328.

[†] *Shuman v. Drayton*, *supra*.

where there is no evidence of the want of ordinary skill.¹ Failure to use ordinary skill in discovering a serious rupture, after repeated examinations for the purpose, is such negligence as will render a physician liable to damages.² Where the act to be done depends upon the skill of the agent, and the operation of causes over which he has no control, a promise to cure will not be implied from an undertaking to cure.³ Nominal damages only can be recovered, unless the plaintiff shows injury resulting from negligence or want of due skill.⁴ Although physicians are bound to the universally accepted methods of cure, yet where there is a difference of opinion among practical and skilful surgeons, they may exercise their best judgment and cannot be held liable for mere error therein.⁵ He is not a warrantor of a cure unless he makes a special contract to that effect.⁶

Sec. 786b. Malpractice—Pleading and procedure.—A physician may be sued either for tort or upon a contract express or implied existing between himself and patient;⁷ and if upon contract, the petition should show who requested the service and with whom the contract was made.¹⁰ If the facts stated do not sufficiently show a contract and a breach, the action will be considered one in tort.¹¹ An action for unskillfully performing an operation may be joined with one for maliciously pretending that he would effect a cure, with intent to defraud.¹² An action may be maintained against two physicians who are in partnership for the malpractice of one of them.¹³ The peti-

¹ *Winner v. Lathrop*, 23 N. Y. S. 516.

² *Lewis v. Dwinell*, 84 Me. 497.

³ *Bliss v. Long*, W. 851, 852; *Galagher v. Thompson*, W. 466.

⁴ *Craig v. Chambers*, 17 O. S. 258.

⁵ *Pittigrew v. Lewis*, 46 Kan. 78; 26 Pac. Rep. 458 (1891); *Burnham v. Jackson*, 26 Pac. Rep. 250 (Colo., 1891); *Vanhoefer v. Berghoff*, 90 Mo. 488. The test of the treatment is governed by the general doctrine of the school to which the defendant belongs, and not by any other. *Patten v. Wiggin*, 51 Me. 594; *Force v. Gregory*, 27 Atl. Rep. 1116 (Conn., 1893).

⁶ *Burnham v. Jackson*, *supra*; *Patten v. Wiggin*, 51 Me. 593.

⁷ *Gladwell v. Steggall*, 5 Bing. N. C. 788; *Pippin v. Sheppard*, 11 Price, 400; *Lane v. Boiscourt*, 128 Ind. 420; s. c., 27 N. E. Rep. 1111. As to waiver of tort, see *De Hart v. Haun*, 126 Ind. 378; *Globe v. Dillon*, 86 Ind. 837; s. c., 44 Am. Rep. 408. An action for negligence in reducing a dislocated arm should ordinarily be an action in tort. *McCrory v. Skinner*, 2 W. L. M. 203.

¹⁰ *Scudder v. Croeson*, 43 Ind. 343.

¹¹ *De Hart v. Haun*, 126 Ind. 378.

¹² *Cadwell v. Farrell*, 28 Ill. 438.

¹³ *Hyrne v. Erwin*, 23 S. C. 226; s. c., 55 Am. Rep. 15; *Hess v. Lowrey*, 122 Ind. 225; *Fletcher v. Ingram*, 46 Wis. 191; *Taylor v. Jones*, 42 N. H. 25.

tion should allege the specific things concerning which negligence is imputed,¹ with reasonable particularity only.² It is not necessary to allege that it was the duty of the defendant to act skillfully, but the facts only should be stated, and the duty will be inferred therefrom.³ If abandonment be claimed it should be stated, although evidence showing it might be admissible under allegations that the defendant unskillfully conducted himself, and that by reason of "defendant's careless, negligent, improper and unskillful attention" the injury resulted.⁴ In an action against a physician for malpractice, proof that he was a cancer doctor, having skill and experience in the cure and treatment of cancers, is not a variance.⁵ The action may be maintained by the personal representative of a person whose death occurs by reason of the negligence of a physician.⁶

Sec. 787. Petition against physician.—

Plaintiff complains of the said J. M., defendant, for that the plaintiff, before and at the time of the retainer of the defendant hereinafter mentioned, had a small tumor on her nose, the precise nature of which she did not know, and that afterwards, to wit, on or about the — day of —, 18—, the said plaintiff, at the special instance and request of the said defendant, employed and retained him, said defendant, as a physician to treat and cure the same for a reasonable fee and reward to be by her to him paid; and the said defendant undertook and entered upon such retainer and employment; yet the said defendant, not regarding his duty in the premises, so carelessly, negligently and unskillfully treated said disease, and nursed and attended to said plaintiff for the cure of said tumor, that the plaintiff, by reason of such unskillfulness, carelessness and negligence, has wholly lost her nose; that she has been greatly injured and rendered unfit to follow her lawful business, which is that of a school teacher, and became thereby sick and continued sick and unable to attend to her said business and work for a long period, to wit, —, and during said period suffered and was in great bodily pain, and was put to great expense in and about the cure of her nose, so that by the defendant's carelessness and unskillfulness plaintiff has suffered damages in the sum of \$—.

[Prayer.]

J. P. B., Attorney.

NOTE.—From *Musser v. Chase*, 29 O. S. 577. Proof that the physician accepted the employment will sustain the allegation that he was employed at his special instance and request. *Id.*

¹ *Hawley v. Williams*, 90 Ind. 160.

⁴ *Lawson v. Conaway*, 37 W. Va.

² *Carpenter v. McDavitt*, 53 Mo. 159.

App. 393.

⁵ *Musser v. Chase*, 29 O. S. 577.

³ *Jones v. Burtis*, 88 Wis. 478.

⁶ *Chase v. Nelson*, 39 Ill. App. 53.

Sec. 788. Petition for damages against surgeon.—

[*Caption and formal averments.*]

That on the — day of —, 18—, plaintiff met with an accident in which his left hip was dislocated, and on the — day of —, 18—, for a reasonable fee, he employed the defendant A. B., who was then and is now a practicing physician and surgeon in the city of C., who makes a specialty of the practice of surgery, and holds himself out to the public as possessing special skill in this branch. That said defendant thereupon undertook such employment and did set plaintiff's said hip, but, disregarding his duty in the premises, he did so negligently and unskillfully set plaintiff's hip that by reason thereof [*state damages sustained*].

That by reason of the aforesaid negligence of said defendant plaintiff has sustained damages in the sum of \$—, for which he asks judgment against said defendant.

Sec. 789. Petition for malpractice in wrongfully diagnosing disease.—

Defendant has for several years prior to —, 18—, been engaged in the practice of medicine and surgery in the city of —, holding himself out to the public as a physician, attending to all diseases or ailments of the human body.

That on or about the — day of —, 18—, the plaintiff T. N. was afflicted with a disease of his right hip, and on or about that date called the said defendant in to attend and treat him for said disease; that defendant thereupon undertook to attend plaintiff and treat said disease, but that, disregarding his duty, defendant wrongfully and carelessly failed to make a proper examination of plaintiff, such as a physician of ordinary skill would have done, and pronounced said disease to be rheumatism, when in fact it was a disease of the hip-joint, which said disease has well-known, peculiar signs and symptoms which a physician of ordinary skill and care would at once detect.

That the defendant, disregarding his duty as a physician, negligently and unskillfully treated the plaintiff for rheumatism, and not hip-joint disease, and continued to so treat him until —, 18—.

That on or about the — day of —, 18—, plaintiff began to entirely lose the use of his said leg, and called in other physicians, when by careful and thorough treatment plaintiff partially recovered the use of his said limb, but that he will be, by reason of said defendant's negligent treatment, permanently crippled. That if defendant had exercised due care and skill in the treatment of plaintiff, he would have speedily and completely recovered. [*Set out any special damages.*]

[*Prayer.*]

NOTE.— If the *gravamen* of the action against a physician is in failing to make proper diagnosis and to prescribe proper remedies, the action is in

tort and not contract. If the action is upon contract, the special contract must be set out. *Wood v. Railroad Co.*, 83 Wis. 898; *Nelson v. Harrington*, 72 Wis. 591.

Sec. 789a. Malpractice — The answer.— A patient whose own neglect or carelessness concurs with the maltreatment of the physician in causing injury cannot recover;¹ and so if the injury be caused by the careless treatment of the patient's parents or others having charge.² The negligence to constitute a defense must have concurred in producing the injury.³

Sec. 789b. Malpractice—Attorneys.— A standard of care is required of an attorney in his professional conduct as in the case of physicians, and he is liable for malpractice where a client or a third person has suffered injury through his negligence.⁴ An attorney is not liable for neglect of a duty where the negligence complained of in its legal effect does not work an injury.⁵ Reasonable care, such as is ordinarily exercised by attorneys at the particular bar, is probably what is exacted.⁶

¹ *Becker v. Janiski*, 15 N. Y. S. 675; *Gramm v. Boener*, 56 Ind. 497; *O'Brien*, 137 Mass. 424, 427; *Looff Hibbard v. Thompson*, 109 Mass. v. *Lawton*, 97 N. Y. 478; *Weeks* on 286; *Jones v. Angell*, 95 Ind. 376; *Attys.*, sec. 138; *State v. Chapman*, 11 O. 430.

² *Sanderson v. Holland*, 39 Mo. App. 234.

³ *Harter v. Morris*, 18 O. S. 492.

⁴ *Cooley on Torts*, p. 683.

⁵ Forms of Petitions are found at secs. 269-271a.

CHAPTER 58.

MANDAMUS.

Sec. 790. Definition of the writ.	Sec. 802. Petition by school examiner to compel board of education to fix and pay his compensation.
791. There must be no adequate remedy at law.	803. Petition to gain possession of books and papers of a public office.
792. Scope of the writ.	804. Petition to compel railroad to run cars.
793. It will not control discretion.	805. Petition to compel approval of officer's bond.
794. Mandamus to state officials.	806. Motion for alternative writ.
795. Mandamus to judges and courts.	807. Motion and notice for alternative writ.
796. Mandamus to county officials.	808. Alternative writ.
797. Mandamus to municipal officers.	809. Form of alternative writ.
798. Mandamus to township officers.	810. By what court it may issue.
799. Mandamus to private corporations.	811. The return or answer.
800. Application for the writ or petition.	812. Demurrer to petition.
801. Petition by state auditor to compel county auditor to correct tax duplicate.	813. Demurrer to answer.
	814. Peremptory writ.

Sec. 790. Definition of the writ.—Mandamus is a writ issued in the name of the state to an inferior tribunal, a corporation, board or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.¹ While the civil action under the code embraces all such judicial proceedings as were previously denominated actions at law or suits in equity, it does not include proceedings in mandamus.² Under recent decisions it is nothing more than an action between the party on

¹ O. Code, sec. 6741.

² *Chinn v. Trustees*, 32 O. S. 236. See *State ex rel. v. Bowersock*, 1 O. C. C. 127; *State ex rel. v. Smiley*, 14 O. C. C. 660 (Summers, J., holding at not appealable). *Contra*, *State ex rel. v. Commissioners*, 15 O. C. C. 40.

whose relation it is brought, and the defendant, and is an action at law, the state being merely a nominal party.¹

Sec. 791. There must be no adequate remedy at law.—The origin of this writ was to remedy many wrongs for which the law furnished no adequate redress, not to interfere with but to assist in the administration of justice; consequently it is a rule that the writ will issue only when the law provides no specific remedy, but in justice and good government there ought to be one.² It must not be issued where there is a plain and adequate remedy in the ordinary course of law; and it may issue on the information of the party beneficially interested.³

Sec. 792. Scope of the writ.—The duties sought to be enforced need not necessarily be specifically stated by law, but they may sometimes arise by implication. It extends to those who have placed themselves in such a position that the law will impose upon them duties in the interest of the public. It will not issue to enforce private contracts or obligations arising merely upon contract, involving no trust,⁴ but is confined to civil rights, and the proceedings should be the same as in civil actions. Great caution should be exercised by those resorting to this remedy in determining the exact measure of their rights. There is, however, a tendency to escape the extreme severity of the rule that if the party claims more than he can maintain upon trial he will be denied relief, or, if he claims less than his rights, he cannot recover that not claimed. To escape this perilous rule, courts hold the difference between the two writs as immaterial, or allow the alternative writ to be amended.⁵ The writ will issue, therefore, to compel the performance of a number of acts, or such distinct acts or parts of acts to which it is shown that the relator is entitled, where there is not such mutual dependence between the several acts

¹ *State ex rel. v. Farmer*, 7 O. C. C. 430; *Cf.* 14 O. C. C. 660.

² *In re Turner*, 5 O. 542 (1832); *Freon v. Carriage Co.*, 42 O. S. 30 (1884).

³ O. Code, sec. 6744; *Freon v. Carriage Co.*, 42 O. S. 30; *State v. Meile*, 22 O. S. 534; *State v. Stewart*, 6 W. L. B. 188-9; 15 O. C. C. 200.

⁴ *State v. Turnpike Road Co.*, 16 O. S. 308 (1865); 15 O. C. C. 200.

⁵ *State v. Crites*, 48 O. S. 174 (1891); *State v. Board of Aldermen*, 1 S. C. 80; *State v. Weld*, 89 Minn. 426; *State v. Baggott*, 96 Mo. 63; *Dillon, Mun. Corp.*, sec. 879; *Johnes v. Auditor of State*, 4 O. S. 498; *Fornoff v. Nash*, 23 O. S. 335.

or parts of acts that they cannot be separated or divided.¹ The writ may in the discretion of the court be refused when the relator has slept upon his rights an unreasonable length of time.² Nor will it issue to compel a person to do something from which he is prohibited by a subsisting decree of injunction.³

Where a public officer is called upon to perform a plain and specific duty required by law, ministerial in its nature, calling for the exercise of no discretion or official judgment, he may be compelled, upon his refusal, to perform the same in the absence of any other means of relief.⁴ This right depends upon the legal duty, which must be clear, and its performance will not be excused by any doubts concerning his duty.⁵ It will lie in all cases where the relator has a clear legal right to the performance of some official and corporate act by a public officer or corporation, and there is no other specific adequate remedy.⁶ A plain dereliction of duty must be established.⁷ The writ cannot be adopted to try the title to an office, and is never issued, when a person is in office by color of right, to admit another thereto. The proper remedy in such cases is an information in the nature of *quo warranto*.⁸

Although the question of strict title cannot be determined in mandamus, yet sufficient investigation may be made in a case where it is sought to compel the approval of a bond, to ascertain whether a certificate of appointment held by the relator is *prima facie* evidence of title;⁹ and it has been resorted

¹ State ex rel. v. Crites, *supra*.

² Chinn v. Trustees, 32 O. S. 236; State ex rel. v. Commissioners, 18 O. S. 386.

³ Railroad Co. v. Commissioners, 7 O. S. 278.

⁴ State ex rel. v. Moore, 43 O. S. 108.

⁵ State ex rel. v. Auditor, 43 O. S. 311.

⁶ Railroad Co. v. Commissioners, 1 O. S. 78.

⁷ Ex parte Black, 1 O. S. 80; Moses on Mandamus, 124; State ex rel. v. Commissioners, 20 O. S. 430.

⁸ St. Louis County Court v. Sparks, 10 Mo. 117; s. c., 45 Am. Dec. 355;

State v. Dunn, 12 Am. Dec. 25; State ex rel. v. Sullivan, 83 Wis. 416; s. c., 53 N. W. Rep. 677; State ex rel. v. Plambeck, 54 N. W. Rep. 667 (Neb., 1898); People v. Goetting, 80 N. E. Rep. 968 (N. Y., 1892). Where a *prima facie* title to a public office is shown, mandamus will lie to obtain possession of the books of the office, but not to try title. Ewing v. Turner, 35 Pac. Rep. 951 (Okla., 1894).

⁹ State ex rel. v. Plambeck, 54 N. W. Rep. 667 (Neb., 1898). See State ex rel. v. Council, 56 N. W. Rep. 570 (Mich., 1893).

to as the speediest and best method of settling a dispute between two claimants to a municipal office,¹ and to compel the recognition of a *de facto* officer until the rights of the parties can be determined.²

Sec. 793. It will not control discretion.— While a writ will issue to compel an officer or an inferior tribunal to exercise its judgment, or to proceed to discharge any of its functions, or to perform an act which may be discretionary, it cannot be used to control discretion whether the act be judicial or one *quasi-judicial* in its nature.³ If no private rights intervene, courts cannot compel the exercise of discretion.⁴ The expediency of the construction or repair of a bridge is discretionary with the commissioners.⁵ The discretion of an officer must be exercised upon his own responsibility, and no other tribunal can, in the absence of bad faith, fraud or gross abuse of discretion, interfere or control it, whatever differences of opinion there might be as to the propriety of the action.⁶ The writ will be allowed, however, where there has been a clear abuse of discretion,⁷ and will also compel a recusant officer to exercise it by setting him in motion, and requiring him to act promptly in obedience to law.⁸ But it cannot be invoked to correct errors,⁹ nor to compel a general course of official conduct. An officer who disregards or violates his duty may be required to perform a certain act or vacate an order, or to perform a public duty; but no suggestion as to the manner of performance can be

¹ Keough v. Board, 156 Mass. 403.

² In re Delgado, 140 U. S. 586.

³ R. S., sec. 6742; Commissioners v. Commissioners, 24 O. S. 401; State v. Harris, 17 O. S. 608; Burnett v. Auditor, 12 O. S. 54; Commissioner v. Board, 39 O. S. 628; State v. Commissioners, 26 O. S. 24; Ex parte Black, 1 O. S. 30; State ex rel. v. Campbell, 48 O. S. 442; Dalton v. State, 43 O. S. 652; State v. Smith, 5 W. L. B. 881; State ex rel. v. Commissioner, 49 O. S. 301; State ex rel. v. Crites, 48 O. S. 460; State ex rel. v. Commissioners, 26 O. S. 864.

⁴ Turnpike Road v. Commissioners, 1 O. S. 149.

⁵ State ex rel. v. Commissioners, 49 O. S. 301.

⁶ Turnpike Road v. Commissioners, 1 O. S. 149. This case is evidently overruled on the point of compelling action. State ex rel. v. Moore, 42 O. S. 108; 1 O. S. 149; State v. Harris, 17 O. S. 608; State ex rel. v. Richardson, 40 O. S. 652; State ex rel. v. Erman, 18 W. L. B. 173; Moses on Mandamus, sec. 78.

⁷ Virginia v. Rives, 100 U. S. 823.

⁸ Littlefield v. Newell, 27 Atl. Rep. 110 (Me., 1893); State ex rel. v. Commissioners, 31 O. S. 451.

⁹ State ex rel. v. Crites, 48 O. S. 460.

made, as courts will not become schools for the training of the inefficient.¹

Sec. 794. Mandamus to state officials.—Mandamus is issued upon the theory that the judiciary of a state is supreme, and that its authority is absolute in the determination of all legal questions brought before it, and that no person is placed beyond the restraining authority of the law. The propriety or impropriety of issuing the writ is determined, not by the office of the person to whom it is directed, but by the nature of the thing to be done.² There are many duties imposed by law upon the governor of a state, and if the writ were not allowed to issue against him it would be impossible to obtain redress for the violation of many rights.³ Although the discretion of a governor cannot be controlled by judicial power, yet as to any ministerial act which may be required of him affecting any specific private right he is amenable to the compulsory process of a court by mandamus.⁴ This doctrine, however, is disputed by a strong array of authority.⁵ It will therefore lie to compel the governor to issue a proclamation enjoined upon him by law;⁶ but not to compel him, as a member of a canvassing board, to re-assemble the board and to ascertain and count certain votes, containing the initial letter only of the Christian name of a candidate, as different from those votes containing the full Christian name, in the

¹ *State ex rel. v. Murphy*, 8 O. C. C. 332; *State ex rel. v. Columbus*, 19 W. L. B. 847; *State ex rel. v. Francis*, 95 Mo. 44. A rule without exception is that the writ of mandamus will not be allowed to compel officers vested with discretionary powers to make a particular decision, or to set aside one already made, notwithstanding such decision is erroneous in the sense that it may be reversed upon appeal, writ of error, or other appellate proceeding. See *State v. Commissioners of Hamilton County*, 26 O. S. 364; *People v. Chapin*, 104 N. Y. 96; 10 N. E. Rep. 141; *People v. Board of Auditors*, 10 Mich. 307; 14 Amer. & Eng. Enc. Law, and note;

State ex rel. v. Churchill, 56 N. W. Rep. 484-5 (Neb., 1893).

² *Marbury v. Madison*, 1 Cranch, 170.

³ *State v. Martin*, 88 Kan. 641.

⁴ *State v. Chase*, 5 O. S. 528 (1856); *State v. Thayer*, 47 N. W. Rep. 704 (Neb., 1891); *Martin v. Ingham*, 88 Kan. 641; *State v. Blasdel*, 4 Nev. 241; *Middleton v. Low*, 30 Cal. 596; *Greenwood, etc., Land Co. v. Routt*, 17 Colo. 156; *Gray v. State*, 72 Ind. 567.

⁵ *State ex rel. v. Stone*, 25 S. W. Rep. 376 (Mo., 1894), and numerous cases cited by the court; *High, Ex. Rem.*, sec. 118; *Merrill on Mandamus*, sec. 95 et seq.

⁶ *State v. Chase*, *supra*.

absence of an averment that the votes were intended for different persons.¹ And where the governor, auditor and secretary of state have made an apportionment of the state for members of the general assembly, they cannot be required by mandamus to make another apportionment, unless the one made so far disregards the principles prescribed by the constitution as to warrant the court in saying that there was in fact no apportionment made, and that what was done was null and void.²

The writ may also be invoked to compel an auditor of state to perform a ministerial act,³ such as to compel the payment of an appropriation,⁴ or to accept returns for taxation,⁵ or to apportion taxes,⁶ but not to draw a warrant for the payment of articles not authorized to be purchased by an agent of the state,⁷ or for the payment of compensation of officials not authorized by law.⁸ A state insurance commissioner cannot be compelled to issue a certificate of authority to a corporation organized under the laws of another state to do business upon a plan, by the laws of which state, companies of other states are not entitled as of right to a certificate of authority to do business therein;⁹ nor can it be used to prevent the commissioner from revoking a license of a company;¹⁰ nor can the superintendent of an insane asylum be compelled to receive a discharged patient.¹¹ A state reporter may be compelled by mandamus to deliver manuscript to a person having the contract for the printing of the state reports;¹² and so may the trustees of a state institution be compelled to award and execute a contract,¹³ but not at the suit of the lowest re-

¹ *State ex rel. v. Foster*, 38 O. S. 599 (1888).

² *State ex rel. v. Campbell*, 48 O. S. 485.

³ *State v. Warner*, 55 Wis. 271; *Free Press Ass'n v. Nichols*, 45 Vt. 7.

⁴ *State ex rel. v. Oglevee*, 36 O. S. 211; *State ex rel. v. Oglevee*, 37 O. S. 1; *Fordyce v. Godman*, 20 O. S. 1.

⁵ *Bank v. McGregor*, 6 O. S. 45.

⁶ *State ex rel. v. Auditor*, 15 O. S. 482.

⁷ *Boyer v. Morgan*, 5 O. S. 583.

⁸ *State ex rel. v. Williams*, 34 O. S.

218; *Fordyce v. Godman*, 20 O. S. 1.

⁹ *State ex rel. v. Moore*, 39 O. S. 486.

¹⁰ *State ex rel. v. Hahn*, 30 W. L. B. 891; 50 O. S. 714.

¹¹ *Rutter v. State*, 38 O. S. 496.

¹² *Banks v. Dewitt*, 42 O. S. 263.

¹³ *Beaver v. Trustees*, 19 O. S. 97. But see *State ex rel. v. Barnes*, 35 O. S. 136. See *State ex rel. v. Jones*, 17 O. S. 148.

sponsible bidder, where a contract has already, by mistake, been made with a higher bidder.¹

Sec. 795. Mandamus to judges and courts.—The writ of mandamus may be issued against inferior courts as well as against other officials. A common use of the writ is to keep inferior courts within lawful bounds, and it is now the established remedy to compel inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.² While there are many instances where the writ has been resorted to as against courts, it would not be consistent here to extensively review them.³ The rule is well settled that it cannot be used to correct errors committed by a court, or in fact any tribunal exercising judicial functions.⁴ It will also issue to compel a court to exercise a discretion but not to control it.⁵

The right to resort to a writ of mandamus to compel a judge to allow and sign a bill of exceptions is well settled.⁶ A judge cannot refuse to allow and sign a bill of exceptions merely because he feels satisfied that the relator had a fair and impartial trial.⁷ But he cannot be compelled to sign a bill when he refuses on the ground that it is not a true one,⁸ as the power of determining whether a bill is true or not rests entirely with the judicial officer to whom it is presented,⁹ and his decision upon this question is final.¹⁰ But he may be

¹ State ex rel. v. Commissioners, 18 O. S. 386.

² Virginia v. Rives, 100 U. S. 318-323; Tapping on Mandamus, 105; Ex parte Bradley, 7 Wall. 364; Merrill on Mandamus, sec. 186; In re Turner, 5 O. 543, 548.

³ See ch. 14, Merrill on Mandamus.

⁴ State ex rel. v. Nemaha Co., 10 Neb. 32; State ex rel. v. Kinkaid, 23 Neb. 641; 37 N. W. Rep. 612; McGee v. State, 33 Neb. 149; 49 N. W. Rep. 220; State ex rel. v. Holmes, 56 N. W. Rep. 979 (Neb., 1893).

⁵ State v. Webre, 44 La. Ann. 1081; 11 So. Rep. 706.

⁶ State ex rel. v. Hawes, 43 O. S. 16; Page v. Judge, 30 Gratt. 417. See State ex rel. v. Paul, 11 W. L. B. 234.

As to compelling a justice of the peace to sign a bill of exceptions, see State ex rel. v. Wood, 22 O. S. 537; State ex rel. v. Bickman, 4 O. C. C. 246. See Pugh, Judge, v. State, 31 W. L. B. 194; 51 O. S. —.

⁷ State ex rel. v. Hawes, 43 O. S. 16.

⁸ Creager v. Meeker, 22 O. S. 207; People v. Pearson, 2 Scam. 189; s. c., 3 Scam. 270; State ex rel. v. Todd, 4 O. 351.

⁹ State ex rel. v. Bickham, 4 O. C. C. 246; Creager v. Meeker, 22 O. S. 207; State ex rel. v. Linn, 3 W. L. B. 428.

¹⁰ Creager v. Meeker, 22 O. S. 207; State v. Todd, *supra*; Shepard v. Peyton, 12 Kan. 616.

compelled to sign a particular bill which is conceded by him to correctly state the facts;¹ and if he refuse he must make known the cause for such refusal.²

A probate judge may be compelled by mandamus to issue a warrant for the discharge of a patient from an asylum.³ It will not issue to compel a court to hold court and hear an application to be admitted to bail.⁴ In a proper case mandamus will issue to require a court of inferior jurisdiction to take bail.⁵ It will lie to compel the acceptance of a surety and the suspension of the jurisdiction of a court,⁶ and to exercise its jurisdiction.⁷ Where a judge determines that he has not jurisdiction, mandamus will not compel him to proceed in the usual manner, but the question of jurisdiction must be determined on error.⁸ It may be awarded for the correction of records, in which case it is properly directed to the judge.⁹ It will not lie to compel a judge to appoint counsel in a criminal case, when there is no such delay as will raise the inference that no appointment will be made.¹⁰

Sec. 796. Mandamus to county officials.—The writ has been used to compel a county auditor to transfer real estate on the tax duplicate to the name of another person,¹¹ or to compel the refunding of taxes paid into the treasury by mistake;¹² but he cannot be compelled to enter a tax upon the duplicate until the time arrives for making it up.¹³ He may be compelled to pay costs in a criminal case out of the county treasury;¹⁴ to draw warrants upon the treasury which are required by law;¹⁵ to draw a warrant for the payment of a sum of

¹ *State ex rel. v. Hawes*, 48 O. S. 16; *Douglas v. Loomis*, 5 W. Va. 542.

² *State ex rel. v. Judge*, 1 W. L. J. 358.

³ *State ex rel. v. Burgoyne*, 7 O. S. 158.

⁴ *Kendle v. Tarbell*, 24 O. S. 196.

⁵ *State v. Von Martels*, 11 W. L. B. 154.

⁶ *State ex rel. v. Court of Common Pleas*, 15 O. S. 377. See *State ex rel. v. Block*, 8 W. L. B. 792.

⁷ *In re Turner*, 5 O. 542.

⁸ *McBride v. Murray*, 25 N. Y. S. 481.

⁹ *Hollister v. Judge*, 8 O. S. 201.

¹⁰ *Baker v. State*, 86 Wis. 474; 56 N. W. Rep. 1088 (1893).

¹¹ *Cincinnati College v. Yeatman*, 80 O. S. 276; *Cincinnati College v. La Rue*, 22 O. S. 469.

¹² *Flack v. Humphreys*, 24 O. S. 335.

¹³ *Zanesville v. Richards*, 5 O. S. 589.

¹⁴ *Raber v. Auditor*, 12 O. S. 429.

¹⁵ *State ex rel. v. Van Horne*, 7 O. S. 327; *Smith v. Commissioners*, 9 O. 256; *State v. Armstrong*, 12 O. 116; for jury's board, *State ex rel. v. Auditor*, 43 O. S. 311.

money wrongfully allowed by the commissioners;¹ to draw a warrant for the payment of a bill approved by a county official but not allowed by the commissioners;² to issue an order for the payment of excessive jury fees, even though certified to by the clerk;³ to draw an order upon the treasury where he has no right to determine the amount, unless the same has been ascertained or liquidated;⁴ or to compel him to call attention of the commissioners to erroneous taxes charged and collected in previous years.⁵ A citizen and tax-payer of a school district is a proper party to enforce by mandamus an official duty by the auditor.⁶

The writ will be awarded to compel a treasurer to pay orders⁷ or to compel the transfer to the state treasury of the state's proportion of taxes.⁸ It is the appropriate remedy to compel clerks of courts to perform their official duties.⁹ A clerk may be compelled to make out an order and certificate for a change of venue,¹⁰ or to issue an execution upon a judgment upon demand therefor,¹¹ or to enter an order upon the journal of the court.¹² It will not lie to compel a clerk to give a certificate of election unless the person is clearly entitled to it;¹³ nor to compel the performance of a municipal act by a clerk which was not performed at the proper time, when no longer consistent with the rights of the parties;¹⁴ nor to compel a clerk and justices to canvas election poll-books and furnish evidence to a person upon which to base a contest;¹⁵ or to abstract votes cast for a person to an office, unless the same is required to be filled by the electors at an election;¹⁶ or to

¹ State ex rel. v. Yeatman, 23 O. S. 546.

² State ex rel. v. McConnell, 28 O. S. 569.

³ State v. Merry, 84 O. S. 187.

⁴ Commissioners v. Auditor, 1 O. S. 822.

⁵ State ex rel. v. Werk, 11 W. L. B. 89.

⁶ State v. Henderson, 88 O. S. 644; State v. Cappeller, 89 O. S. 468.

⁷ Case v. Wresler, 4 O. S. 561; Cass Tp. v. Dillon, 16 O. S. 88.

⁸ State ex rel. v. Staley, 88 O. S. 259.

⁹ High on Ex. Rem., secs. 17, 24, 80.

¹⁰ State v. Shaw, 48 O. S. 324.

¹¹ State ex rel. v. Eager, 8 O. C. C. 581.

¹² State ex rel. v. Menchem, 6 O. C. C. 81.

¹³ State ex rel. v. Dambaugh, 20 O. S. 167.

¹⁴ Ingerson v. Berry, 14 O. S. 816.

¹⁵ State ex rel. v. Stewart, 26 O. S. 216.

¹⁶ State ex rel. v. McGregor, 44 O. S. 628.

compel a clerk to transmit papers in a case for the removal of a cause in an action not clearly falling within the law.¹

A prosecuting attorney may be compelled to indorse his certificate upon a contract made by the commissioners as required by law, it being purely a ministerial act.² A sheriff may be compelled by mandamus to give notice and make proclamation for the election of an officer;³ and mandamus is the appropriate remedy to compel a superintendent of a work-house to take a party imprisoned before the commissioner of insolvents.⁴

Obligations arising upon contract merely, and involving no trust, cannot be enforced by mandamus.⁵ Commissioners of a county have not such an interest in a turnpike as will entitle them to prosecute a writ of mandamus to compel the company to repair a bridge.⁶ Mandamus is the proper remedy to compel commissioners who refuse to perform a duty enjoined by statute, not involving judicial discretion.⁷

¹ *State ex rel. v. Rabbitts*, 46 O. S. 178.

² *Fornoff v. Nash*, 23 O. S. 335.

³ *State v. Brown*, 88 O. S. 844.

⁴ *Ex parte Scott*, 19 O. S. 581.

⁵ *State ex rel. v. Turnpike Road Co.*, 16 O. S. 308.

⁶ *State ex rel. v. Turnpike Road Co.*, 16 O. S. 308.

⁷ *State ex rel. v. Harris*, 17 O. S. 608; *Commissioners v. Hunt*, 88 O. S. 169. They may be compelled to levy a tax. *State ex rel. v. Commissioners*, 85 O. S. 458; *State ex rel. v. Harris*, *supra*; *State ex rel. v. Commissioners*, 6 O. S. 280. See *Tilson v. Commissioners*, 19 O. 415. They may be compelled to award a contract to a person entitled thereto (*Boren v. Commissioners*, 21 O. S. 311; *State v. Betts*, 4 O. C. C. 86); or to pay an officer fees allowed by law (*State ex rel. v. Commissioners*, 41 O. S. 423); or to approve a bond (*State ex rel. v. Lewis*, 10 O. S. 128; *State ex rel. v. Commissioners*, 81 O. S. 451; but see *State ex rel. v. Commissioners*, 7

O. S. 125; *State ex rel. v. Commissioners*, 14 O. S. 515); or to issue an order for the payment of services of prosecuting attorney (*State ex rel. v. Commissioners*, 20 O. S. 421; *State ex rel. v. Commissioners*, 40 O. S. 831); only in capital cases (*State ex rel. v. Commissioners*, 26 O. S. 599); but not services of an attorney before a magistrate (*State ex rel. v. De Laney*, 21 O. S. 648); or for services in assisting the prosecuting attorney in examining the annual report of commissioners. *Anderson v. Commissioners*, 25 O. S. 18. As to attorney fees for county treasurer, see *State ex rel. v. Commissioners*, 26 O. S. 864. For services of janitor of court-house, see *Dalton v. Commissioners*, 9 W. L. B. 322. Their discretion in constructing bridges cannot be controlled. *State ex rel. v. Commissioners*, 49 O. S. 301. See *State ex rel. v. Commissioners*, 31 O. S. 211. They cannot be compelled to accept a bid by one who has not complied with the law. *American*

Sec. 797. Mandamus to municipal officers.—Where an officer has been appointed in accordance with a municipal ordinance, the council have no discretion but must approve the bond of such officer, and may be compelled to do so by mandamus.¹ Nor can a city solicitor refuse to furnish vouchers for payment for lands regularly condemned by a city for a street, and may be compelled to do so by mandamus.² Mandamus may be pursued by property owner to compel the opening of a sewer;³ or to compel the completion of an apportionment of an assessment for improvements;⁴ or to compel a city auditor to draw a warrant.⁵ The remedy cannot be adopted to compel a municipal officer to perform an act authorized by law, such as the removal of an official.⁶

Sec. 798. Mandamus to township officers.—A resident tax-payer of a school district has such a pecuniary and parental interest as will enable him to maintain an action in mandamus to compel a board of education to perform its legal duty.⁷ This remedy may also be pursued to compel the board to appropriate money for the payment of bonds;⁸ or to compel the township trustees to certify to the county auditor the amount of tax necessary to meet township bonds;⁹ or to compel a township clerk to draw an order on a township treasurer;¹⁰ or to compel township trustees to levy a tax to pay interest on township bonds.¹¹ A relator cannot compel a

Clock Co. v. Commissioners, 81 O. S. 415. See *State ex rel. v. Commissioners*, 20 O. S. 425; *State ex rel. v. Commissioners*, 26 O. S. 581.

¹ *State ex rel. v. Cincinnati*, 11 O. S. 544. See *State ex rel. v. Boyce*, 48 O. S. 46.

² *Ryan v. Hoffman*, 26 O. S. 109.

³ *Springmyer v. State*, 1 O. C. C. 501.

⁴ *State ex rel. v. Mitchell*, 81 O. S. 592.

⁵ *State ex rel. v. Cleveland*, 23 W. L. B. 118.

⁶ *State ex rel. v. Murphy*, 3 O. C. C. 832. A board of city fire commissioners cannot be compelled to restore a discharged official. *State ex rel. v. Board*, 26 O. S. 24. City clerk

cannot be required to make advertisement required of him by ordinance. *State ex rel. v. Henderson*, 38 O. S. 644. City council cannot be compelled to order an election. *Dutton v. Hanover*, 42 O. S. 215.

⁷ *State ex rel. v. Board, etc.*, 35 O. S. 368.

⁸ *State ex rel. v. Board*, 27 O. S. 96.

⁹ *State ex rel. v. Trustees*, 20 O. S. 288.

¹⁰ *State ex rel. v. Williams*, 29 O. S. 161. See *Case v. Wresler*, 4 O. S. 561.

¹¹ *Shoemaker v. Goshen Township*, 14 O. S. 569; *State ex rel. v. Trustees*, 14 O. S. 588. But see *Hopple v. Brown Township*, 13 O. S. 811.

board of education to award a contract unless he shows a clear legal right.¹

Sec. 799. Mandamus to private corporations.—It is well settled that the writ will lie to exercise a visitatorial power over private corporations, to keep them within their lawful powers, and to correct and punish abuses of their franchises.² The weight of authority, however, seems to hold that mandamus is not the proper remedy to compel the transfer of shares of stock in a purely private moneyed corporation.³ This rule is based upon the theory that there is an adequate remedy at law in damages, or by a suit in equity to compel the specific performance by enforcing the issue and delivery of the certificate;⁴ and upon the same principle the writ will not issue to compel a corporation to issue bonds to one of its creditors in order to obtain the benefit of a mortgage security, where the right thereto is doubtful.⁵

Courts in some instances have allowed the writ to restore a person to membership in an incorporated company; but where a civil action in damages has been brought for the loss sustained by such expulsion, the right to mandamus is thereby waived.⁶ The authorities are somewhat divided upon this question, some holding that the writ will lie to compel the reinstatement of an expelled member,⁷ though the general tendency of the courts is to refrain from the domestic broils of voluntary associations.⁸ Where a corporation is in the hands of a receiver, mandamus will not issue against both corporation and receiver for the purpose of directing their conduct with reference to

¹State ex rel. v. Board, 42 O. S. 374.

²Merrill on Mandamus, sec. 157.

³Freon v. Carriage Company, 42 O. S. 80; Merrill on Mandamus, sec. 160; Wood on Mandamus, 23; High on Ex. Rem., sec. 318; Murray v. Stevens, 110 Mass. 95; State ex rel. v. Carriage Co., 11 W. L. B. 103, and cases cited. See Slemmons v. Thompson, 31 Pac. Rep. 514 (Oreg., 1892); State ex rel. v. Carpenter, 51 O. S. 83.

⁴State ex rel. v. Carpenter, *supra*; Freon v. Carriage Company, *supra*,

and cases cited; Cushman v. Thayer M. Co., 76 N. Y. 385; Railway Co. v. Robbins, 35 N. Y. 500; Ham v. Railroad Co., 29 O. S. 174. *Contra*, Rice v. Rockefeller, 31 N. E. Rep. 907.

⁵Ham v. Railway Co., 29 O. S. 174.

⁶State ex rel. v. Slavonaka Lipa, 28 O. S. 665. See Merrill on Mandamus, secs. 170-71.

⁷Evans v. Club, 50 Pa. St. 107.

⁸People ex rel. v. Church, 58 N. Y. 103; Hershiser v. Williams, 24 W. L. B. 314; s. c., 6 O. C. C. 147, and cases cited.

the operation of the company.¹ The right of shareholders of a corporation to inspect the books may be enforced by mandamus.² It has been held that a natural-gas company, being somewhat public in its nature, owes a duty to supply gas to all,³ and may therefore be compelled by mandamus to furnish gas to those entitled to receive it.⁴

Sec. 800. Application for writ or petition.—At one time the alternative writ was the only pleading on the part of the relator, which was given the same effect as ordinary pleadings in a civil action.⁵ Under existing statutes in Ohio, application for the writ must be by petition, in the name of the state, on relation of the person applying, and verified by affidavit.⁶ The verified petition is, therefore, the pleading on the part of the relator. The petition, affidavit and order allowing the writ must all be embodied in the writ, thus making it simply a medium through which the petition, affidavit and order are conveyed to the defendants.⁷ The ordinary rules of pleading are applicable to the remedy. The pleadings have the same effect, and must be construed and may be amended as in other actions.⁸ It is to the petition we look for the essential averments to sustain the action. Motions may be made to require the relator to make his pleading definite and certain.⁹ The petition must allege facts sufficient to show that the officer against whom it is prayed has omitted a manifest duty. It should contain not only the affirmative allegations of pro-

¹ State ex rel. v. Railroad Co., 85 O. S. 154.

² State ex rel. v. Farmer, 7 O. C. C. 429.

³ Cook on S. & S., sec. 674. To the same effect are the following adjudicated cases: State v. Columbus Gaslight & Coke Co., 34 O. S. 572; New Orleans Gaslight Co. v. Louisiana Light & Heat Producing, etc. Co., 115 U. S. 656; 6 Sup. Ct. Rep. 252; People v. Manhattan Gaslight Co., 45 Barb. 186; Gibbs v. Gas Co., 130 U. S. 396; 9 Sup. Ct. Rep. 558; Williams v. Gas Co., 52 Mich. 499; 18 N. W. Rep. 236; Gaslight Co. v. Richardson, 63 Barb. 437.

⁴ Portland Nat. Gas Co. v. State,

34 N. E. Rep. 818 (Ind., 1898); 8 Am. & Eng. Ency. of Law, pp. 1284-89; People v. Manhattan Gas Co., *supra*; Williams v. Gas Co., *supra*; Gaslight Co. v. Richardson, *supra*.

⁵ Fornoff v. Nash, 23 O. S. 335 (1872). This is so held in several jurisdictions. Merrill on Mandamus, sec. 253.

⁶ O. Code, sec. 6743. As to verification, Black v. Auditor, 26 Ark. 287; People v. Chicago, 25 Ill. 483.

⁷ State ex rel. v. Dalton, 1 O. C. C. 119.

⁸ O. Code, sec. 6751.

⁹ State ex rel. v. Dalton, 1 O. C. C. 119; Fornoff v. Nash, 23 O. S. 335.

ceedings necessary to entitle the party to the process prayed for, but it must also be averred that other facts which would justify the omission do not exist. The facts which go to constitute the duty, that the omission is without excuse, that the relator is clearly entitled to due performance, that he will be prejudiced by non-performance, and that he has no other adequate remedy, must be pleaded distinctly and issuably.¹ Formerly no reply was allowed,² and allegations of fact in the answer inconsistent with the statements of fact in the writ were deemed controverted, as upon a specific denial, without reply.³ But now the plaintiff may demur to the answer or reply to any new matter therein; and the defendant may demur to the reply as in a civil action.⁴

In mandamus, as in civil actions, a general demurrer to the reply will search the record and put in issue the sufficiency of the petition.⁵ An application for a mandamus to compel a judge to sign a bill of exceptions should be accompanied by the bill which was tendered him for allowance.⁶ Formerly a relator was required to show himself entitled to the relief demanded or he could take nothing. But as the remedy is now a civil action, a more liberal judgment is awarded; and where the whole prayer cannot be granted, a portion will be granted.⁷

Sec. 801. Petition by state auditor to compel county auditor to correct tax duplicate.—

[*Caption.*]

The relator, E. W. P., says that he is now, and has been since the — day of —, 18—, the duly elected, qualified and acting auditor of the state of Ohio, and that the defendant F. R. is now, and has been since the — day of —, 18—, the duly elected, qualified and acting auditor of — county, Ohio. Relator further says that the city of C. is a city of the — grade and of the — class, and was during the period of time hereinafter referred to; and that the values of different pieces of property in said city are, and during the period

¹ State ex rel. v. Bickham, 4 O. C. C. 246; High on Ex. Rem., secs. 10, 12, 536; 12 Ill. 254; 9 Neb. 92; 15 Barb. 607. All the facts showing the relator's right to the writ must be stated. People v. Church, 3 Lana. 434; State v. Hammerstein, 95 Mo. 159.

² Old Code, sec. 577.

³ State ex rel. v. Union Tp., 9 O. S. 599 (1859).

⁴ O. Code, sec. 6749.

⁵ State ex rel. v. Crites, 48 O. S. 142.

⁶ Creager v. Meeker, 23 O. S. 207.

⁷ Ross v. Board, 42 O. S. 379.

of time hereinafter referred to were, equalized by an annual board of equalization, as provided in the statutes of the state.

Relator further says that the total amounts added to and deducted from the values of different pieces of realty in said city by the said annual boards of equalization for the years 18—, 18—, 18— and 18—, were as follows: [*State amounts added.*]

Relator further says that the said amounts added and deducted are in addition to and exclusive of the amounts added and deducted by said boards of equalization respectively to and from the values of the new entries, new buildings and buildings, orchards, timber, ornamental trees and groves destroyed of each year, as said values were presented to them by the auditor of — county and the assessors of C.; and that said deductions are also in addition to and exclusive of the amount deducted by said boards themselves for buildings, orchards, timber, ornamental trees and groves destroyed in each year, where the assessor had failed to make return of the destruction of the same and to fix a value thereto.

Relator further says that in each of said years from 18— to 18—, inclusive, said boards illegally reduced the value of real property of the city of C. below its aggregate value as fixed by the state board of equalization and below its aggregate value on the duplicate of the preceding year, exclusive of the addition of the value of the new entries and new structures of each year over the value of the buildings, orchards, timber, ornamental trees and groves destroyed of each year; and that the illegal reduction in each year of said aggregate value is the difference between the several amounts added and deducted as set forth in the figures above.

Relator further says that on the — day of —, 18—, the defendant as auditor of —, H. county, addressed a communication to him as auditor of state, as provided in section 166, Revised Statutes, setting forth the facts hereinbefore stated as to the actions of the boards of equalization of the city of C. for the years 18—, 18—, 18— and 18—, and requesting instructions from him as to his duty in the premises; that on the — day of —, 18—, relator, as auditor of state, addressed a communication to the defendant as auditor of — county, in which relator expressed the opinion that the said board had acted illegally in making their deductions in excess of their additions as aforesaid in each year; and instructed him that he regarded such deductions as illegal and void.

Relator further says that on the — day of —, 18—, said auditor of — county addressed a communication to relator in answer to the communication of relator of the — day of —, 18—, as aforesaid; that in said communication said auditor declined to regard as illegal the deductions, or any part thereof, made during the years 18—, 18—, 18— and 18—

by said boards of equalization; and to correct the valuation of any of the pieces of property whose values were illegally reduced by said boards; and to charge upon the duplicate the taxes omitted by reason of said illegal deductions.

Wherefore relator prays that a writ of mandamus may issue commanding the defendant, as auditor of — county, that he proceed according to law to correct on the duplicate for the years 18—, 18—, 18—, 18—, 18— and 18—, the values of the property from which said deductions were illegally made; and to charge the taxes against the same according to law.

(Signed)

D. K. W.,

Attorney-General.

R. B. S.

T. MoD.

[*Verification.*]

NOTE.—From *State ex rel. Poe v. Raine*, 47 O. S. 447, which approved this form, holding it to be the duty of a county auditor to disregard acts of a board of equalization in excess of their authority, and that the action of the auditor in this regard may be controlled by the state auditor.

Sec. 802. Petition by school examiner to compel board of education to fix and pay his compensation.—

The relator says that on the — day of —, 18—, he was duly appointed a member of the board of examiners of teachers within and for the school district of C. for the term of three years from the said date, and duly qualified and entered upon and discharged the duties of said office. That at the expiration of said term he was again appointed for a further term of three years, and by renewed appointments continued to hold said office and to discharge its duties until —, 18—. That at the time when he was so appointed and entered upon the duties of said office no compensation had been fixed therefor, and that, although well knowing its duty to fix and pay a compensation to relator for his services, the defendant wholly failed either to fix or pay any compensation to relator for such services until —, 18—, when it fixed the compensation for said office at — dollars a year; that subsequently defendant determined that the payment of such compensation so fixed should commence —, 18, and in — or —, 18—, paid the relator for his services under said appointment for the period between —, 18—, and —, 18—, at the rate of — dollars per annum.

And the relator says that during all of said period of service he continually urged upon and demanded of the members of said defendant board the fixing and paying of his compensation, but that said defendant has wholly failed and refused to fix or pay him any compensation as a member of said board of examiners prior to —, 18—.

And relator avers that said defendant has always been informed of the claim of the relator.

Wherefore relator prays that a writ of mandamus issue commanding said board of education to fix and pay to relator a reasonable compensation for his services as a member of said board of examiners for the period between —, 18—, and —, 18—, and for all other proper relief.

R. K., Attorney for Relator.

NOTE.—From *State ex rel. v. Board of Education of Cincinnati*, Supreme Court, unreported, No. 2065.

Sec. 803. Petition to gain possession of books and papers to public office.—

[*Caption.*]

That at the general election held in the state of Ohio on the — day of —, 18—, for the election of state and county officers, the relator, M. and B. were the only candidates for whom votes were cast for the office of auditor of — county, Ohio, the said relator, M. and B. having previously been legally nominated by their respective political parties in convention assembled for that purpose.

That the relator received the highest number of votes cast for said office for a term of two years beginning on the — day of —, 18—, at said election, and was duly declared elected by the board of deputy supervisors of said county; and was, on the — day of —, 18—, duly commissioned by the governor of said state as such auditor, filed his bond, which was duly approved by the board of county commissioners of said county on the — day of —, 18—, and took the oath of office on the same day.

That on the — day of —, 18—, the relator demanded of the said M., who for the immediately preceding term of four years had been auditor of said office, and still continued such auditor, the possession of the said office of auditor, and the books, papers and other property pertaining to the same, but he, the said M., refused to surrender the possession thereof, or anything connected therewith, and still so refuses.

Wherefore, etc., that he should not be compelled to deliver the possession of the books, papers and other property pertaining to said office to the relator.

NOTE.—Based on the doctrine of *Ewing v. Turner*, 35 Pac. Rep. 951, and cases there cited. See *ante*, sec. 792.

Sec. 804. Petition to compel railroad to run cars.—

That the — Railroad Company, a corporation of the state of —, duly incorporated under the general laws of this state, was authorized by its said charter to construct and operate a railroad for the transportation of freight and passengers from — to —.

That said railroad has for a long time constituted a direct and important route for public travel, greatly accommodating the same, and necessary for the public convenience.

That the said railroad is bound by the terms of its charter to run its cars and transport passengers from the said — to the said — to such an extent as to afford reasonable accommodation to the traveling public.

That said railroad on the — day of —, 18—, wholly discontinued the running of its said trains from — to —, and now stop at —, about — miles from the said —, although often requested by plaintiff and others, who were desirous of being transported to the said —, to continue their passage to the said —, as required by their said charter, but that it has ever since refused and still refuses to run its said trains over that part of the road between the said — and the said —, to the great damage and inconvenience of plaintiff and many others residing at the said —.

Plaintiff therefore prays that a writ of mandamus may be issued, directed to the said — Railroad Company, commanding them to run their said trains from — to —, as required by their said charter.

[*Oath.*]

Sec. 805. Petition to compel approval of officer's bond.—

[*Caption and formal averment.*]

That at the general election held on the — day of November, 18—, in the county of —, and state of Ohio, the relator was duly elected sheriff of said county for a term of two years from the — day of —, 18—.

That on the — day of —, 18—, he was duly commissioned by the governor of said state as such sheriff for said term, and has taken the oath of office.

That on the — day of —, 18—, the auditor of said county issued a written call to C. D., E. F. and G. H., the persons constituting the board of county commissioners of said county, convening them in special session at said auditor's office on the — day of —, 18—.

That pursuant to said call said commissioners met in said auditor's office for the purpose of considering the approval of the official bond of the relator as such sheriff.

That the relator, while said board was so in session, presented to it his official bond as such sheriff, payable to the state of Ohio in the penal sum of — thousand dollars, duly signed by himself as principal and — other persons as sureties, to wit: [*name them*], and acknowledged before a notary public of said county, conditioned according to law, for the approval of said board.

That with said bond the relator then and there presented his commission to said board as such sheriff and offered to

make proof of the sufficiency of said bond and the sureties thereon, and demanded that the bond be approved by the board.

That said board, without any excuse, refused to approve said bond. That said sureties were all *bona fide* residents of — county, and were the owners in fee-simple of real estate in said county of the value of — thousand dollars over all incumbrances thereon, and they were worth over all their indebtedness — dollars.

That at the time said relator was so elected sheriff, at the time he was so commissioned and at the time he so tendered his bond, he had been a *bona fide* resident and elector of said county for more than two years, and still is such an elector, fully qualified to hold said office of sheriff.

Wherefore he prays that a writ of mandamus issue out of this court requiring the defendant to show cause why it should not be compelled to approve said bond.

[*Oath and jurat.*]

NOTE.— Adapted from *Board v. State*, 61 Ind. 379. See *ante*, sec. 792, page 768.

Sec. 806. Motion for alternative writ.—The petition should be accompanied with a formal motion asking for the issuance of an alternative writ, upon which a court must determine whether a writ should issue. The court may require a notice of the application to be given to the defendant, or may grant an order to show cause why it should not be allowed, or may allow the writ without notice.¹ A motion may not be absolutely essential, but it is the better way to bring the matter properly before the court. It should be placed on the motion docket and heard as other motions, when presented to the court. The alternative writ may be issued by a judge at chambers.²

Sec. 807. Motion and notice for alternative writ.—

[*Caption.*]

The relator herein moves the court for the allowance of an alternative writ of mandamus against the defendant herein, upon the petition in this cause, according to the statute in such case made and provided.

D. K. W., Attorney.

NOTICE.

The defendants above named will take notice that the foregoing motion will be pressed for hearing in the supreme court of Ohio, on — the — day of —, 18—, at — A. M., or as soon thereafter as the court can hear the same.

¹ O. Code, sec. 6743. If filed in the supreme court it must be governed by its rules of practice.

² R. S., sec. 6745.

Sec. 808. Alternative writ.—When the right to require performance is not clear, and there is not therefore sufficient ground for the allowance of a peremptory writ in the first instance, an alternative writ should then be issued.¹ The alternative writ is an order, with a copy of the petition or application attached, requiring the defendant to do the act, or show cause before the court, at a specified time and place, why he does not do the act, which must be entered on the journal of the court.² The alternative writ should be drafted by counsel and submitted to the court before it is issued.³ It should contain all the facts necessary to justify the order sought by the proceeding, and omissions cannot be supplied by affidavit.⁴ A summons is not necessary, as the alternative writ takes its place and is the only proper process.⁵

Sec. 809. Form of alternative writ.—

IN THE SUPREME COURT OF OHIO.

THE STATE OF OHIO, }
Franklin County. } ss.

To ————:

We hereby command you that forthwith upon the receipt of this writ you [*here state fully the matters sought and prayed for in the petition*], as we are asked in a petition to command you to do, a copy of which petition is hereto attached marked "Exhibit A," or else you appear in this court at ——— o'clock A. M., on the ——— day of ———, 18—, and show cause why you have not done or should not do so.

Witness my hand, etc.

———, Clerk.

[*Attach copy of petition.*]

Sec. 810. By what court it may issue.—The writ may be issued by the supreme court, the circuit court or the common pleas court.⁶ The supreme court adopted the rule of practice that the application should be made to the lower courts, unless there were special reasons for making application in that court in the first instance.⁷

Sec. 811. The return or answer.—On the return day of an alternative writ a defendant may answer as in a civil action, or if the writ be allowed by a single judge he may

¹ O. Code, sec. 6745.

⁵ Potts v. State, 75 Ind. 836.

² O. Code, sec. 6746.

⁶ O. Code, sec. 6742.

³ Johns v. Auditor, 4 O. S. 493.

⁷ State ex rel. v. Williams, 26 O. S.

⁴ McKenzie v. Ruth, 22 O. S. 371; 170.

High on Ex. Rem., sec. 537.

demur.¹ The parties may, however, by agreement dispense with a return or answer and any other formal pleadings authorized by statute.² If an answer is made it must respond to all the allegations in the writ,³ and be framed as an ordinary answer in civil cases. An answer by a judge, when it is sought to compel him to sign a bill of exceptions, that the writ presented is not a true one, is a good defense.⁴ The respondent may set forth as many defenses as he may have if they are consistent with each other.⁵ A demurrer to a petition and the order or writ issued thereon raises the question of the sufficiency of the cause of action.⁶ The return must contain positive allegations of fact and not mere inferences from facts;⁷ and it is construed most strongly against the pleader.⁸

Sec. 812. Demurrer to petition.—

[*Caption.*]

Now comes the defendant, W. H. H., and demurs to the petition of the relator herein, for the reason that the same does not state facts sufficient to constitute a cause of action against him, or to warrant the relief therein prayed for.

Sec. 813. Demurrer to answer.—

The plaintiff demurs to the answer of the defendant to the petition and alternative writ, for the reason that the same does not state facts sufficient to constitute a defense.

Sec. 814. Peremptory writ.— When the right to require performance is clear and it is apparent that no valid excuse can be given for not performing it, a court may, in the first instance, allow a peremptory mandamus.⁹ It cannot be awarded in any other form than that fixed by the alternative writ.¹⁰ Where there are a number of acts to be done by the defendant, either separated or connected, the relator is entitled to a peremptory writ for such distinct acts or connected acts as he may show himself entitled to, where they can be separated or divided.¹¹ There should be a return to the peremp-

¹ O. Code, sec. 6748.

² *State ex rel. v. Ottinger*, 48 O. S. 457.

³ *Gorgas v. Blackburn*, 14 O. 252.

⁴ *Creager v. Meeker*, 22 O. S. 207.
See *State ex rel. v. Hawes*, 48 O. S. 16.

⁵ *High on Ex. Rem.*, secs. 457, 463.

⁶ *Potts v. State*, 75 Ind. 336.

⁷ *State ex rel. v. Hawes*, 48 O. S. 16.

⁸ *Gorgas v. Blackburn*, 14 O. 252.

⁹ O. Code, sec. 6745.

¹⁰ *Morgenthaler v. Crites*, 4 O. C. C. 485.

¹¹ *State ex rel. v. Crites*, 48 O. S. 142.

tory writ, the office of which is to show a compliance with the order of the court. This, however, is not conclusive, and may be controverted by the relator.¹ And the remedy for disobedience of, or non-compliance with, a peremptory writ of mandamus is by a motion to show cause why the defendant should not be attached for contempt, which should be prosecuted before the court granting the writ; the judges at chambers have no jurisdiction.²

¹ *State ex rel. v. Crites*, 48 Q. S. 460.

² *Davis v. State*, 29 W. L. R. 263;
State ex rel. v. Crites, 48 Q. S. 460.

CHAPTER 59.

MASTER AND SERVANT—RELATING TO MATTERS OTHER THAN NEGLIGENCE—CONTRACTS OF SERVICE.

<p>Sec. 815. Action on contract of service.</p> <p>816. Same continued — Constructive service.</p> <p>817. Petition on verbal contract for services for amount due.</p> <p>818. Petition by master for an assault upon his servant.</p> <p>819. Petition by employee against employer for re-</p>	<p>fusing to take him into his service.</p> <p>Sec. 820. Petition by servant against administrator of master upon promise to pay servant for extra services.</p> <p>821. Answer setting up misconduct of servant.</p> <p>822. Answer setting up incompetency of servant.</p>
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Sec. 815. Action on contract of service.—To sustain an action for the recovery of damages for breach of a contract of service it is not necessary for an employee who has been wrongfully discharged to tender his services or to keep himself in readiness to re-enter the employer's service.¹ He is bound to use reasonable care and diligence to obtain other employment.² The burden is upon the defendant to show that plaintiff could have procured other work.³ The fact that the petition claims for *wages* on a contract of employment, instead of for damages for a breach is not material for his right to recovery, where the facts alleged, entitles the plaintiff to a judgment.⁴ Recovery may be had as upon an implied *quantum meruit* for the value of service rendered under special contract which has been wrongfully terminated.⁵ In an action upon an express contract for service the petition should aver that the services were rendered to the defendant at his request.⁶ An allegation that "defendant dismissed plaintiff from his employ, giving as his reason the winding up of his business," is an allegation of the termina-

¹ *Hinchcliffe v. Koontz*, 121 Ind. 276; *Hinchcliffe v. Koontz*, 121 Ind. 422; *James v. Allen Co.*, 44 O. S. 226. 422.

² *Howard v. Daly*, 61 N. Y. 362; ⁴ *Tiffin Glass Co. v. Stoebr*, 54 O. Chamberlain v. Morgan, 68 Pa. St. S. 157. *Cf. Elliott v. Miller*, 17 N. 168; *King v. Steiner*, 44 Pa. St. 99. Y. S. 526; *Bean v. Elton*, 44 Ill.

³ *Railway Co. v. Lutes*, 112 Ind. App. 442.

⁵ *Ralston v. Kohl*, 30 O. S. 92.

⁶ *Carey v. Post*, 2 C. S. C. R. 62.

tion of the contract, and the action is based on the provision of the contract and not for its breach.¹

Sec. 816. Same continued — Constructive service.—

Where a hiring is for a year at a certain sum per month, without any stipulation as to when payment shall be made, it is an entire contract, and recovery cannot be had by a person who leaves such employ before the expiration of the year.² Nor is such a contract considered by the authorities as divisible by reason of the fact that payment is to be made at a certain rate per day or month.³ There is some conflict upon the remedy to be pursued by a person who has been employed for a specified time and wrongfully discharged before the expiration thereof. The fiction is maintained in some jurisdictions that the employee may remain idle until the expiration of the time and sue for the compensation agreed upon, as if he had fully performed his part of the contract. The doctrine of constructive service has been repudiated in Ohio as a pernicious one, and the remedy held to be that, where an employee under contract for a specified time, whose wages are payable in instalments, has wrongfully been discharged before the expiration of his contract, and whose wages at the time of his discharge have been paid, is an action for damages, and not the recovery of future instalments of wages.⁴

Sec. 817. Petition on verbal contract for services for amount due.—

1. That on or about the — day of —, 18—, defendant entered into a verbal contract with plaintiff, whereby plaintiff and defendant agreed that plaintiff should work for defendant at his, defendant's, dairy, at —, Ohio, and upon his farm at —, Ohio, at such times as directed by the defendant, from the — day of —, 18—, to the — day of —, 18—. From the — day of —, 18—, to the — day of —,

¹ *Heckt v. Brandus*, 23 N. Y. S. 1004.

⁴ *James v. Allen Co.*, 44 O. S. 226-

² *Larken v. Buck*, 11 O. S. 561; *Lantry v. Parks*, 8 Cow. 68; *Wright v. Turner*, 1 Stewart, 29; *Badgley v. Heald*, 4 Gilm. 64; *Mallen v. Gilkinson*, 19 Vt. 503; *Miller v. Goddard*, 34 Me. 102; *Davis v. Maxwell*, 12 Met. 286.

³ *Stein v. Steamboat Co.*, 17 O. S. 476.

238; *James v. Commissioners*, 9 W. L. B. 186; *Moody v. Leverick*, 4 Daly, 401; *Howard v. Daily*, 61 N. Y. 362. *Contra*, *Strauss v. Meerliet*, 64 Ala. 299; *Huntington v. Railroad Co.*, 7 Am. L. Reg. (N. S.) 143; *Wood's Mayne on Damages*, 317-328; *Wood's Master and Servant*, 246-7; 8 So. L. Rev. 432.

18—, plaintiff was to receive for his services, and defendant agreed to pay to plaintiff therefor, the sum of \$—— per month.

From the —— day of ——, 18—, to the —— day of ——, 18—, plaintiff was to receive for his services, and defendant agreed to pay him therefor, the sum of \$—— per month, and board and lodge plaintiff during said periods of time.

Plaintiff commenced working for said defendant under said contract, and continued to labor for him thereunder, from said —— day of ——, 18—, down to the —— day of ——, 18—, and fully performed his part of said contract, whereby there became due and payable to plaintiff from the defendant the sum of \$——.

2. [*Formal averments.*] That on the —— day of ——, 18—, at the expiration of the contract set forth in his first cause of action herein, plaintiff and defendant entered into an agreement whereby plaintiff agreed to work for defendant at his dairy at ——, Ohio, and upon his farm at ——, Ohio, at such times as directed by defendant, at each of said places, for no fixed or definite period of time. For said services said defendant agreed to board and lodge plaintiff at his expense, and pay him in addition thereto the sum of \$—— per month.

Plaintiff went to work for defendant under said agreement on the —— day of ——, 18—, and continued to work for him until the —— day of ——, 18—.

Upon the —— day of ——, 18—, plaintiff and defendant agreed that the value of plaintiff's services for a portion of the time plaintiff worked for him as above stated, that is to say, from the —— day of ——, 18—, to the —— day of ——, 18—, were worth the sum of \$—— per month, including board and lodging; and defendant then agreed to pay said sum of \$—— per month for said period last mentioned, for plaintiff's services.

Whereby there became due and payable, from defendant to plaintiff, the sum of \$——.

Plaintiff says, during the time he worked for defendant, and since then, the defendant has paid plaintiff, to apply on his compensation for his said services, at divers times, the exact amounts and dates of which plaintiff cannot now give, about the sum of \$——, leaving a balance due and unpaid plaintiff, for his said services, as set forth in his said causes of action, from the defendant, in the sum of \$——, with interest from the —— day of ——, 18—, for which, together with his costs herein expended, plaintiff asks judgment against the defendant.

Sec. 818. Petition by master for an assault upon his servant.—

That on the —— day of ——, 18—, the defendant unlawfully made an assault upon C. D., who was then and still is

in the employ of plaintiff, as a servant, and beat and wounded said C. D., by reason whereof he became disabled and unable to perform the work which plaintiff had employed him to do for [*state how long*], during all of which time the plaintiff was deprived of his services, which were of the value of \$——.

That the plaintiff has sustained damages by reason of said assault [*state damages*].

[*Prayer.*]

Sec. 819. Petition by employee against employer for refusing to take him into his service.—

On the —— day of ——, 18—, plaintiff entered into a verbal contract with the defendant, by which it was agreed that the defendant should employ plaintiff in the capacity of [*state what*], for the period of one year, beginning on the —— day of ——, 18—, and ending on the —— day of ——, 18—, the said defendant agreeing to pay plaintiff for his services the sum of \$—— per month.

On the —— day of ——, 18—, the date on which said service was to begin, plaintiff tendered himself in readiness to begin such service, but that defendant wholly refused to take him into his said service according to his said agreement, and still refuses so to do, although plaintiff has held himself in readiness to fulfill and carry out his part of the contract of service.

Defendant has wholly failed and refused to carry out his part of the contract, by reason whereof plaintiff has been damaged [*state special damages*].

[*Prayer.*]

NOTE.—A person may recover damages for a breach of an executory contract. *Railway Co. v. Lutes*, 112 Ind. 276.

Sec. 820. Petition by servant against administrator of master upon promise to pay servant for services.—

On the —— day of ——, 18—, one G. H., late of the county of —— and state of Ohio, died intestate, and on the —— day of ——, 18—, the defendant C. D. was duly appointed by the probate court of said county administrator of the estate of said G. H., deceased.

That plaintiff was in the service of the said G. H., deceased, in the capacity of a domestic servant, at [*state wages*], the terms of their contract of service providing that such service should continue until either plaintiff or the said G. H. should determine the same by giving to the other of them thirty days' notice of his intention so to do; and thereupon, in consideration that plaintiff would continue in the service of the said G. H. in the capacity aforesaid until the death of the said G. H., the said G. H. promised plaintiff to pay him —— dollars; and plaintiff accordingly continued in the service of

the said G. H. in the capacity aforesaid until the death of the said G. H., and all conditions were fulfilled and all things happened, and all times elapsed, necessary to entitle plaintiff to be paid the sum of — dollars, yet the same remains due and unpaid to plaintiff.

Plaintiff therefore asks judgment against said defendant for the sum of \$—— with interest at —— per cent. from ——, 18—.

Sec. 821. Answer setting up misconduct of servant.—

That after the making of the contract sued on and before the alleged dismissal, the plaintiff wilfully misconducted himself by [*state facts*].

Wherefore, and for no other reason, he was discharged by defendant, and this is the breach complained of.

NOTE.— A servant discharged for improper conduct cannot collect any part of his salary from the last pay-day to the time of his dismissal. *Ridgway v. Market Co.*, 8 Ad. & El. 171; *Turner v. Robinson*, 6 C. & P. 15. Faithful service is a condition precedent to the right of recovery by the servant. *Libhart v. Wood*, 1 W. & S. 265; *Senger v. McCormick*, 4 W. & S. 265; *Britton v. Turner*, 6 N. H. 481; *Kearney v. Holmes*, 6 La. Ann. 873.

Sec. 822. Answer setting up incompetency of servant.—

[*Caption.*]

That at the time defendant entered the employ of the plaintiff as [*state what*], as alleged in the petition, plaintiff represented to defendant that he was thoroughly qualified, and was possessed of sufficient skill and ability as such [*state position*] to perform the services for which he was employed by defendant; and defendant, relying upon said representations, was thereby induced to employ the plaintiff.

That the plaintiff was wholly disqualified and unable to do and perform the work for which defendant hired him, and for that reason solely defendant discharged him.

CHAPTER 60.

MISTAKE

Sec. 823. Mistake — General principles governing relief against — Pleading.

824. Petition to set aside cancellation of judgment en-

tered by mistake, and to revise same.

Sec. 825. Answer to action on contract claiming mistake.

Sec. 823. Mistake—General principles governing relief against — Pleading.— This subject has been discussed elsewhere¹ with reference to a particular class of instruments, and the principles there evolved are applicable to mistake in whatever form it may appear. It was there seen that the mistake must be material, mutual and without negligence, and usually one of fact.² And while it has been repeatedly held that a mistake or misapprehension of law will not entitle a person to relief,³ there are instances where one who has acted under a misapprehension of his legal rights,⁴ as well as in cases of peculiar character, where relief has been granted when the mistake was one of law,⁵ or where parties have made a mistake in the legal effect of an instrument.*

Money voluntarily paid under a mistake of law, in the absence of fraud or mistake of fact, however, cannot be recovered back.⁶ It is otherwise where it is paid under a mistake of fact, in which case it is not essential that the mistake should

¹ See sec. 1095, *post*.

² See sec. 1095, *post*; *Irwin v. Wilson*, 45 O. S. 426.

³ See sec. 1095, *post*; *Goltra v. Sanasack*, 53 Ill. 456. A court will not reform a written instrument by supplying the intention of the parties omitted through mistake of law and not of fact. *Allen v. Anderson*, 44 Ind. 395; *Cox v. Insurance Co.*, 29 Ind. 536; *Nelson v. Davis*, 40 Ind. 366.

⁴ 2 *Pomeroy's Equity*, sec. 849; 15 *Am. & Eng. Enc. of Law*, p. 634. See sec. 1095, *post*.

**Clayton v. Freet*, 10 O. S. 545. *Pomeroy Eq. Jur.*, sec. 845.

⁵ *Nelson v. Davis*, 40 Ind. 366;

1 *Story's Eq.*, sec. 116; *Oiler v. Gard*, 23 Ind. 212. A mistake of law may be corrected in equity. *McNaughten v. Partridge*, 10 Ohio, 223. Money deposited as security, without any intention of passing title, may be recovered. *Morgan Park v. Gahan*, 35 Ill. App. 646.

⁶ *Kinney v. Dodge*, 101 Ind. 573; *Bond v. Coates*, 16 Ind. 202; *Carley v. Lewis*, 24 Ind. 23. See *Lafayette, etc. Co. v. Pattison*, 41 Ind. 312; *Hollingsworth v. Stone*, 90 Ind. 244; *Butt v. Jennings*, 81 Ind. 69.

have been induced by a wrongful act.¹ To warrant relief on the ground of mistake, the action by the party must be prompt upon its discovery,² although delay may be immaterial so long as the rights of third persons do not intervene.³ The subject falling under the head of equitable jurisdiction, to warrant the court in considering the question and granting relief, the complaint must contain the requisite allegations to bring it clearly under this head.⁴ The petition should ordinarily point out the mistake, and show the tenor of the instrument and the true contract in terms.⁵ But where the facts stated clearly show a mistake, it is not essential that there be a direct averment of a mistake;⁶ and in seeking relief against a judgment, all the facts or grounds on which the mistake is based should be fully set forth;⁷ or in an action to recover money paid on a fraudulent note, it should be alleged that the payment was made under a mistake of fact, without knowledge of the fraud.⁸ For the rule as to seeking relief upon the ground of fraud and mistake the reader is referred to a later section where it is fully stated.⁹ An action will lie for a mistake in the transmission of a telegram.¹⁰ And relief will be granted by way of reformation where a written instrument, executed by a surety, by mistake fails to express the actual agreement and intention of the parties, and will be enforced against the surety.¹¹

Sec. 824. Petition to set aside cancellation of judgment entered by mistake and to revive same.—

Plaintiff says that on the — day of —, 18—, by the consideration of the court of common pleas of — county, Ohio, he recovered a judgment against the said defendants, the O. S. Co., A. G. S. and R. W. S., for the sum of — dollars and costs of suit in the sum of \$—, and the said judgment

¹ *Billings v. McCoy*, 5 Neb. 187; *Brown v. Road Co.*, 56 Ind. 110; *Lewellen v. Garrett*, 56 Ind. 442.

² *Sable v. Maloney*, 48 Wis. 331; *Thomas v. Bartow*, 48 N. Y. 193.

³ *Real Estate Trust Co. v. Balch*, 45 N. Y. Super. 523.

⁴ *White v. Denman*, 1 O. S. 110; *Nevins v. Dunlap*, 33 N. Y. 676.

⁵ *Stephens v. Walton*, 6 Oreg. 193.

⁶ *Maher v. Insurance Co.*, 67 N. Y. 283.

⁷ *Finch v. Hollinger*, 47 Ia. 173.

⁸ *Murphy v. Creighton*, 45 Ia. 179; *Muscatine v. Keokuk*, 45 Ind. 85;

Baldwin v. Foss, 71 Ia. 339.

⁹ See sec. 1095, *post*.

¹⁰ *Western Union Tel. Co. v. Reed*, 96 Ind. 195.

¹¹ *Neininger v. State*, 34 N. E. Rep. 633; 50 O. S. 394.

was to bear interest at the rate of — per cent. per annum from the date of the rendition thereof.

That neither the said O. S. Co., the said A. G. S. in his lifetime, or his administrators since his decease, nor the said S. have paid any part of said judgment, or anything to apply thereon, or anything in satisfaction thereof.

That heretofore, to wit, on the — day of —, 18—, N. L. B., as the attorney of this plaintiff, without any authority whatever from the plaintiff or without the knowledge or consent of the plaintiff or any of its officers, and without any consideration whatever, but through mistake, meaning and intending to release another judgment which said plaintiff had and held in said court against the defendant A. G. S. alone, wrote upon records of this court opposite the statement of said judgment on the appearance docket the following:

“ This judgment has been fully settled and is hereby satisfied.

(Signed)

“ N. L. B.,

“ Attorney for,” etc.

But the plaintiff avers that the said judgment had not in fact been settled or adjusted, and no part thereof had been paid, either to said plaintiff's attorney or to the said plaintiff or any officer of the plaintiff. But the same was by mistake so done, and without any consideration, and without, in fact, any intention on the part of said attorney to release said judgment, but to release another which said bank had and held against said A. G. S. in said court, which had been fully settled. That said mistake was not discovered until —, 18—.

Wherefore this plaintiff prays that said erroneous entry of satisfaction upon said judgment in favor of the said plaintiff, and against said O. S. Co., A. G. S. and R. W. S., so entered upon the — day of —, 18—, may be set aside and held for naught, that said judgment may be revived against the said O. S. Co., the estate of A. G. S. and R. W. S., and for other proper relief.

NOTE.— Adapted from *Barbour v. National Exchange Bank*, error to circuit court of Seneca county, Supreme Court, unreported, No. 1872. Such a cancellation may be set aside and vacated by a motion, or by petition and proof. *Wilson v. Stilwell*, 14 O. S. 465-8.

Sec. 825. Answer to action on contract claiming mistake.

Defendant says that the writing set out in the petition purporting to set forth the contract between E. D. D., B. L. S. and this defendant does not state the terms and conditions of the agreement actually made between the parties; by mutual mistake, oversight and omission, in reducing said contract to writing, the real understanding and agreement of said parties was not expressed therein. This defendant avers that the real contract made between said parties and attempted to be expressed in said writing was [*here state what defendant claims*

contract to be]. To express the agreement of the parties to said contract said writing therefore should state [*here state what contract should be*]. The defendant says that he did not know that said contract did not express the real contract between the parties thereto, and he only discovered the same as herein set out a short time prior to filing this answer herein.

Wherefore defendant prays that on a final hearing of this case the said written instrument may be corrected so that the same will express the real agreement made between this defendant and plaintiff and B. L. S. as set out in this answer, first by showing the correct [*here state corrections desired to be made*]; that the ambiguity in said contract in the expression "balance to be paid to us" may be corrected, and the real balance meant by said parties may be determined by the court; and that this defendant be discharged from any liability to the plaintiff, or to the late firm of S. & B., and with his reasonable costs.

NOTE.—Modeled from *Bryant v. Swetland*, 48 O. S. 194. Action for relief of this nature must be brought within ten years. *Id.*; R. S., sec. 4985. The statute begins to run from the time of the execution of the contract, and not from time of discovering the mistake. 48 O. S. 194. The statute runs against a claim when set up in the answer as well as when prayed for in the petition. *Id.*; *Wood on Lim.*, p. 601; *Russell on Lim.*, sec. 141; *McEwing v. James*, 86 O. S. 152.

CHAPTER 61.

MONEY HAD AND RECEIVED.

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| Sec. 826. Nature of the remedy. | Sec. 833. Petition by tenant in com |
| 827. The action will lie, when. | mon against co-tenant to |
| 828. Rules of pleading. | recover his proportion of |
| 829. Petition for money received | rents. |
| by defendant to be paid | 834. Petition for money depos- |
| to plaintiff. | ited on contract for pur- |
| 830. Petition for loaned money. | chase of real estate. |
| 831. Petition by accommodation | 835. Petition for money illegally |
| maker of promissory note | received by municipal |
| who has paid the same. | officers in lieu of bail. |
| 832. Petition for money paid out | |
| and expended for use of | |
| defendant. | |

Sec. 826. Nature of the remedy.—The common-law action of *assumpsit* for money had and received was to enforce equitable obligations by enforcing the recovery of money in the hands of persons which they could not in good conscience retain. It was of equitable origin.* It exists under the code with as much power. In fact, it has been extended to embrace many cases originally cognizable only in equity. There is no element of contract other than what may necessarily arise from circumstances.¹ The right on one side and the correlative duty on the other give rise to an implication of a promise.² Whilst it is considered in its nature an equitable action,³ and in its spirit and purpose is likened unto a bill in equity,⁴ yet the mode of trial and the relief is that ordinarily pursued in a legal action; because it really is an action at law.⁵ Although the remedy can be employed only where money has been actually received for the use of another, the petition may nevertheless state facts which show that the money has been received

¹ Roberts v. Ely, 118 N. Y. 128. The law implies a promise to pay. Mason v. Waite, 17 Mass. 563.

² Roberts v. Ely, 118 N. Y. 128.

*See *ante*, secs. c, d.

³ Insurance Co. v. Tunstall, 72 Ala. 142.

⁴ King v. Martin, 67 Ala. 182

⁵ Roberts v. Ely, *supra*.

in such a manner that justice and honesty require that it should be accounted for, which will be considered good.¹

Sec. 827. The action will lie, when.—It may be maintained whenever equity arises from circumstances which require a person who has received money which he ought in good conscience to pay to another. This presumption will not arise until there has been a demand.² The remedy may be pursued to recover money paid by a person as a substitute for bail to avoid imprisonment,³ or for the recovery of money paid under an illegal contract where the person seeking it is not *in pari delicto*,⁴ or for money paid by virtue of a contract which has been rescinded,⁵ or for money paid on a void contract so long as it remains executory, in which case no stipulation can be made to defeat a recovery.⁶ Recovery may also be had where money has been paid upon a contract, the consideration of which has failed, or where it has been abandoned.⁷ Money paid by a shipper to a carrier, who pays a portion thereof to a favored shipper, may be recovered in an action for money had and received from such favored shipper.⁸ The action will also lie to recover money obtained under false

¹ *Sparrow v. Hosack*, 40 O. S. 253. It is immaterial how the money comes into the hands of a person not entitled to it. *Sharp v. Rose*, 20 N. Y. S. 826; 4 *Wait's A. & D.*, p. 508, sec. 80. It should be shown that the money was received under such circumstances as to raise a promise to pay. *McNutt v. Kauffman*, 26 O. S. 127. There must be proof that the money has been paid by plaintiff to the defendant. *Spencer v. Brooks*, W. 178; *Reed v. McGrew*, W. 105.

² *Quimby v. Lyon*, 68 Cal. 394.

³ *Reinhard v. City*, 49 O. S. 257; *Richardson v. Duncan*, 8 N. H. 508; *Watkins v. Baird*, 6 Mass. 506.

⁴ *Spalding v. Bank*, 12 O. 544; *Wabunsee v. Walker*, 8 Kan. 431; *Jacobs v. Stokes*, 12 Mich. 881; *Reinhard v. City*, *supra*; *Worcester v. Eaton*, 11 Mass. 876; *Boardman v. Roe*, 13 Mass. 105; *Wheaton v. Hib-*

bard, 20 John. 290. But the law may imply an obligation to refund money, which is subsequent to and disconnected with the illegal act. *Martin v. Richardson*, 21 S. W. Rep. 1089 (Ky., 1898).

⁵ *Middleport Woolen Mills Co. v. Titus*, 35 O. S. 253; *Fulton v. Insurance Co.*, 28 N. Y. S. 598; *Holbrook v. Holbrook*, 30 Vt. 432; *Graham v. Chandler*, 38 Vt. 559.

⁶ *Gwin v. Smur*, 101 Mo. 550; *Brown v. Timmerman*, 20 O. S. 86; *Woodworth v. Bennett*, 48 N. Y. 273.

⁷ *King v. Hutchins*, 28 N. H. 561; *Condon v. Perry*, 13 Gray, 5; *Leach v. Tilton*, 40 N. H. 473; *Fulton v. Insurance Co.*, 28 N. Y. S. 598.

⁸ *Brundred v. Rice*, 49 O. S. 640. See 7 *Lawson's R. & R.*, sec. 5788; *McGrew v. Produce Exchange*, 85 Tenn. 572; *Handy v. Railway Co.*, 31 Fed. Rep. 689.

representations, the ordinary common-law count being sufficient.¹ And where a life-insurance policy is assigned as collateral security, and the proceeds are paid by the company to the creditor, any surplus after the satisfaction of the debt may be recovered in such an action.² A tort cannot be transformed into an implied promise to make reparation for an injury upon an action in *assumpsit*.³ There is an exception, however, where personal property has been wrongfully converted into money, in which case the owner may sue for money had and received.⁴ A bailor cannot recover for a breach of contract of bailment under an action for money had and received;⁵ nor will the remedy lie, in the absence of fraud and mistake, to recover payments made for bonds sold on the instalment plan.⁶ A board of education may sue its defaulting treasurer as for money had and received.⁷

Sec. 828. Rules of pleading.—In Ohio, where money was sought to be recovered upon a rescinded contract, the use of the ordinary count for money had and received has been criticised as unworthy of imitation;⁸ but in other jurisdictions the common-law count has been considered a sufficient statement of facts as against a demurrer, and a compliance with the code in this respect.⁹ It is not necessary to allege a request or demand for the payment of money. Such an allegation, though usual, is not essential.¹⁰ In an action in substance for money had and received, a general denial only puts in issue the receipt of the money.¹¹

¹ *Grannis v. Hooker*, 29 Wis. 65; *Burke v. Railway Co.*, 88 Wis. 410; s. c., 53 N. W. Rep. 692; *Morse v. Ryan*, 26 Wis. 356.

² *Sharp v. Rose*, 20 N. Y. S. 826; *King v. Van Fleck*, 109 N. Y. 363; s. c., 16 N. E. Rep. 547.

³ *Ingersoll v. Moss*, 44 Ill. App. 72.

⁴ *Cooley on Torts*, 107 (2d ed.); *Ingersoll v. Moss*, *supra*.

⁵ *Anderson v. Cochran*, 92 Mich. 626; s. c., 52 N. W. Rep. 1025.

⁶ *Martin v. Pollatcheck*, 22 N. Y. S. 927.

⁷ *Board, etc. v. Milligan*, 51 O. S. 115; 81 W. L. B. 127.

⁸ *McNutt v. Kauffman*, 26 O. S. 127.

⁹ *Terrell v. Butterfield*, 92 Ind. 1;

Fulton v. Insurance Co., 28 N. Y. S.

596; *Allen v. Patterson*, 7 N. Y. 476;

Farran v. Sherwood, 17 N. Y. 227;

Hosley v. Black, 28 N. Y. 488; *Hurst*

v. Litchfield, 39 N. Y. 377; 1 *Boone on Pldg.*, sec. 171.

¹⁰ *Quimby v. Lyon*, 63 Cal. 394.

¹¹ *Smith v. Wighton*, 35 Neb. 460; s. c., 53 N. W. Rep. 437.

Sec. 829. Petition for money received by defendant to be paid to plaintiff.—

On the — day of —, 18—, one R. F. was indebted to the plaintiff in the sum of — dollars.

That on said day he paid the same to the defendant for the use of plaintiff, and defendant promised and agreed to pay it to plaintiff within a reasonable time thereafter [*or*, on the — day of —, 18—].

That on the — day of —, 18—, the plaintiff demanded the same of the defendant, but payment was refused.

That said sum of money is now due the plaintiff from the defendant and unpaid.

Sec. 830. Petition for loaned money.—

There is due plaintiff from the defendant the sum of \$—, which sum plaintiff loaned to the defendant on the — day of —, 18—, at his request, taking no note or due-bill therefor, which said sum defendant promised to repay to plaintiff on the — day of —, 18—, which he has wholly failed and refused to do.

Wherefore plaintiff asks judgment against said defendant for the said sum of \$—, with interest at —, from —, 18—.

Sec. 831. Petition by accommodation maker of promissory note who has paid the same.—

That on the — day of —, 18—, the plaintiff executed and delivered his certain promissory note, of which the following is a copy, to wit: [*Insert copy.*]

That said note was made at the special instance and request and for the accommodation only of the said defendant, and that the same was not founded upon any valuable consideration whatever; but that the defendant agreed to pay the same when matured.

That thereupon the said defendant indorsed the said note as an accommodation only, and the same was by him before maturity transferred to C. F. for a valuable consideration.

That defendant did not pay the said note or any part thereof when the same became due, or at any time thereafter, and that the plaintiff was compelled to pay the same, and on the — day of —, 18—, did pay the same to the said C. F., and that defendant has not repaid the amount so paid by plaintiff, nor any part thereof.

[*Prayer.*]

Sec. 832. Petition for money paid out and expended for use of defendant.—

There is due plaintiff from defendant the sum of \$— for money paid out and expended for the defendant, C. D., at his special instance and request and for his use, in paying for cer-

tain goods which were consigned to said defendant, and for which he was unable to pay, and could not therefore procure the same until the money was so furnished by this plaintiff.

Defendant has not repaid any part of said sum so paid by plaintiff.

Wherefore plaintiff asks judgment against defendant for the sum of \$——, with interest from ——, etc.

NOTE.—See form in *Billings v. McCoy*, 5 Neb. 187.

Sec. 833. Petition by tenant in common against co-tenant to recover his proportion of rents.—

[*Caption.*]

Plaintiff and defendant are, and have been for —— years, the owners as tenants in common of the premises described as follows: [*describe property*], the plaintiff being seized [*in fee-simple*] of the one—— part thereof, and the defendant being seized [*in fee-simple*] of the one—— part thereof.

That during the years 18— and 18— the defendant received from one L. F. the sum of \$—— as rents and profits derived from said property, to the one—— part whereof the plaintiff is entitled; but that the defendant has not paid to plaintiff his said portion of said rents and profits, or any part thereof, although the plaintiff has demanded from him the payment of the same.

Wherefore the plaintiff asks judgment against the defendant for —— dollars, and all other proper relief.

Sec. 834. Petition for money deposited on contract for purchase of real estate.—

That the defendant entered into a contract in writing with the plaintiff which provided that [*give substance of contract as may seem necessary*]. The defendant at the time of making said contract, as security, as well as for the performance thereof on the part of the defendant, deposited in the hands of the defendant the sum of \$—— as a part of the purchase-money to be paid by plaintiff according to the terms of said contract, said sum to be to and for the use of the defendant, to be retained by the defendant on account of the purchase-money, if the plaintiff should complete his said purchase and receive the deed for the premises described in said contract, but to be to and for the use of the plaintiff, and to be returned to the plaintiff if the defendant should fail to fulfill his contract as aforesaid and to give a deed of said premises pursuant to said agreement.

The plaintiff has always been ready and willing to do and perform everything in said agreement contained, on his part to be performed, and on the —— day of ——, 18—, was ready and willing and duly offered to the defendant to accept and take the deed of said premises pursuant to said agreement.

and to pay him the balance of the purchase-money due therefor; but that defendant did not on said — day of —, 18—, nor at any other time, give the plaintiff a deed of said premises pursuant to said agreement, but has wholly failed and refused so to do.

That on the — day of —, 18—, plaintiff demanded of the said defendant payment of the said sum of — dollars so deposited with the defendant as aforesaid, but that no part of the same has been paid.

Wherefore the defendant owes the plaintiff the sum of — dollars, with interest thereon from said last-mentioned day.

Sec. 835. Petition for money illegally received by municipal officers in lieu of bail.—

[*Caption.*]

Plaintiff says that on the — day of 18—, he was arrested by the police authorities of the city of C—, which said arrest was made by said officers without any charge of any violation of any laws of Ohio, and without any warrant having been issued therefor by said police authorities. And on said — day of —, 18—, plaintiff was taken to the city prison of said city, and there the police authorities demanded of this plaintiff a deposit of the sum of \$— as bail for his appearance to answer some pretended violation of the laws of Ohio, which had not been at that time preferred against him, and in default of payment of which sum of money by plaintiff, the said police authorities ordered plaintiff to be imprisoned within the city prison of said city until the next morning. Thereupon, in order to prevent such imprisonment, plaintiff avers that he was compelled to and did deposit with the police authorities said sum of \$—.

That on the following morning, to wit, on the — day of —, 18—, in the absence of plaintiff, the mayor [*or*, police judge] of said city caused to be filed before him an affidavit charging plaintiff with the violation of a state law, falling within the class of offenses known as misdemeanors within said state. And thereupon, in the absence of plaintiff, and immediately after said affidavit was filed, said mayor [*or*, police judge] declared the sum of \$— so deposited with said police authorities as aforesaid, forfeited unto the city of C.; all of which was done in his absence and without his knowledge and consent. And plaintiff further avers that said affidavit was never read to him until after said forfeiture, and he never was arraigned and required to plead to the matters therein charged against him, which were wholly false and untrue, and he was never given an opportunity to defend against the charge therein contained, nor was there ever a hearing or trial had upon the matters and things charged therein.

Plaintiff avers that upon the following day, — —, 18—,

he first learned of the action taken aforesaid by the said mayor upon said affidavit, and in and about the filing of the same, and the pretended forfeiture of this plaintiff's said money, and on the following day, — —, 18, he went to said mayor and requested him to set aside the said forfeiture of said money unto said city of C., and to give to him a hearing upon said affidavit, all of which the said mayor declined to do.

Plaintiff thereupon, on the same day, while said money was in the hands of said city, to wit, on — —, 18—, demanded of the said city said money, and requested it to pay the same over to him, which it then and ever since then has refused to do, and since which time plaintiff has never relinquished his claim to said money, and at which time he notified the said city that he would bring an action against it for the recovery of said sum of money.

Plaintiff says that by reason of the premises the defendant did unlawfully and illegally receive into its possession the said sum of \$—, on the — day of —, 18—, and therefore asks judgment against said defendant for said sum of \$—, with interest from —.

NOTE.—Adapted from *Reinhard v. City*, 49 O. S. 257-70, holding that where a person is arrested without lawful authority, or for just cause and by lawful authority but for improper purposes, and pays money to obtain his discharge, the same may be recovered as so much money had and received. *Bull. N. P.* 172; 5 *Com. Dig.*, Pleader, 2 W. 18; *Richardson v. Duncan*, 8 N. H. 508; *Watkins v. Baird*, 6 *Mass.* 506. Money paid under illegal contract may be recovered if plaintiff be not *in pari delicto*. *Worcester v. Eaton*, 11 *Mass.* 376; *Boardman v. Roe*, 18 *Mass.* 105; *Wheaton v. Hibbard*, 20 *Johns.* 290. Under the count for money had and received, money obtained by duress, extortion, imposition, or otherwise wrongfully paid, may be recovered. *Wolf v. Marshal*, 52 *Mo.* 167; 2 *Greenleaf on Ev.*, sec. 121. Money cannot be received in lieu of bail (*Butler v. Foster*, 14 *Ala.* 323); and if so received, public authorities have no claim to it. *Columbus v. Dunnick*, 41 O. S. 602; *State v. Lazarre*, 12 *La. Ann.* 166; 1 *Cranch C. C.* 486. As to involuntary payment of illegal demand, see *Mays v. Cincinnati*, 1 O. S. 268; *Baker v. Cincinnati*, 11 O. S. 536-7; *Catoir v. Watterson*, 38 O. S. 319. To be involuntary so that it may be recovered, it must have been paid to release either person or property. *Wolf v. Marshal*, 52 *Mo.* 167; *Wabaunsee Co. v. Walker*, 8 *Kan.* 431; *Eaton v. Eaton*, 35 *N. J. L.* 290. Involuntary payments made under compulsion of legal process, or duress of goods or of the person, which the person receiving has no right to retain, may be recovered back. *Beckwith v. Frisbie*, 32 *Vt.* 559; *Harmony v. Bingham*, 12 *N. Y.* (2 *Kern.* 99); 68 *N. C.* 134; 12 *Am. Rep.* 627; 25 *Mich.* 456; 56 *Ill.* 542; 27 *Mich.* 497; *Chandler v. Sanger*, 114 *Mass.* 864; 19 *Am. Rep.* 367; 61 *Me.* 227; 12 *Am. Rep.* 556; 70 *N. C.* 55; 37 *Tex.* 47; 60 *Barb.* 80. Where a person is actually restrained of his liberty even under a void process, a payment made, which otherwise would not have been made, is a payment under duress. *Durr v. Howard*, 6 *Ark.* 461; *Maxwell v. Griswold*, 10 *How. (U. S.)* 242; *White v. Hezleman*, 84 *Pa. St.* 142.

CHAPTER 62.

MUNICIPAL CORPORATIONS.

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| <p>Sec. 836. Introductory — Constitutional and statutory provisions.</p> <p>837. Classes and grades.</p> <p>838. Municipal corporations — Organized from unincorporated territory.</p> <p>839. Form of petition to incorporate village.</p> <p>840. Filing and notice of petition.</p> <p>841. Hearing and order.</p> <p>842. Proceeding to enjoin organization.</p> <p>843. Form of petition to enjoin organization of village.</p> <p>844. Nature of injunction proceedings.</p> <p>845. Annexation of territory.</p> <p>846. Change of name of village or hamlet.</p> <p>847. Form of petition for change of name of village.</p> <p>848. Notice and hearing of petition for change of name.</p> <p>849. Advancement of hamlets, villages and cities.</p> <p>850. Averment of corporate capacity — Grade and class.</p> <p>851. Constitutionality of laws and ordinances relating to municipalities, how raised.</p> <p>852. Same continued — By <i>quo warranto</i>.</p> <p>853. Same continued — Petition to test constitutionality by <i>quo warranto</i>.</p> <p>854. Same continued — Answer in <i>quo warranto</i>.</p> | <p>Sec. 855. Same continued — Reply in <i>quo warranto</i>.</p> <p>856. Same continued — By injunction.</p> <p>857. Same continued — By <i>mandamus</i>.</p> <p>858. Same continued — By contracts and assessments under unconstitutional laws.</p> <p>859. Municipality — When not liable in damages.</p> <p>860. When liable for damages.</p> <p>861. Liability for failure to keep street in repair.</p> <p>862. Petition for injury sustained by failure to keep street in repair.</p> <p>863. Petition for injury caused by an obstruction in the street.</p> <p>864. Damages from change of grade — Generally.</p> <p>865. When damages for change of grade may be recovered.</p> <p>866. When recovery cannot be had.</p> <p>867. Petition for damages for change of grade.</p> <p>868. When corporation may inquire into damages to private property.</p> <p>869. Petition to assess compensation.</p> <p>870. Injunctions.</p> <p>871. Formal parts of petition in actions brought by city solicitor or tax-payer.</p> <p>872. Assessments.</p> |
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Sec. 873. Same continued — Jurisdictional defects.

874. Petition by contractor to foreclose an assessment lien.

Sec. 875. Petition by several parties to enjoin collection of assessment.

876. Contracts — Pleading of.

877. Condemnation proceedings. Application to assess compensation.

Sec. 836. Introductory — Constitutional and statutory provisions.—There are certain constitutional and statutory provisions in reference to the organization and classification of villages and cities which must be understood by a pleader when bringing or defending actions with reference to municipal corporations. It therefore seems justifiable, by way of introductory and as matter of convenience, to refer to them here.

Prior to the adoption of the constitution of 1851, municipal corporations in Ohio were created by special acts. Each city or village had its own charter. The constitution of 1851 provides¹ that “the general assembly shall provide for the organization of cities and incorporated villages by general laws.” In obedience to this constitutional mandate the general assembly² passed an act “to provide for the organization of cities and incorporated villages.” This was the first municipal code in the state. It has been remodeled and supplemented and re-enacted several times, and now forms sections 1536 to 2729 of the statutes. The constitution further provides³ that “the general assembly shall pass no special act conferring corporate powers.” This constitutional provision inhibits the legislature from passing laws which are applicable to but one city or village. The classification of municipal corporations according to population is constitutional.

Municipal corporations are divided into cities, villages and hamlets; cities are divided into two classes — first and second; cities of the second class are divided into five grades — first, second, third and fourth; cities of the second class which hereafter become cities of the first class shall constitute the fourth grade of the latter class; and villages which hereafter become cities shall belong to the fourth grade of the second class.⁴

¹Sec. 6, art. 13.

²Sec. 1, art. 13.

³On the 8d day of May, 1852 (50 V. 238).

⁴Sec. 1546, R. S., as amended Feb. 10, 1892 (89 O. L. 18).

Sec. 837. Classes and grades.—Cities of the first class are graded as follows: Those which have more than two hundred thousand inhabitants are cities of the first grade; those that have more than ninety thousand and less than two hundred thousand inhabitants are cities of the second grade; those which have more than thirty-one thousand five hundred and less than ninety thousand are cities of the third grade. Cities of the second class are graded as follows: Those which have more than thirty thousand five hundred and less than thirty-one thousand five hundred are cities of the first grade; those which have more than twenty thousand and less than thirty thousand five hundred inhabitants constitute the second grade; those which have more than ten thousand and less than twenty thousand constitute the third grade; those which have more than twenty-eight thousand and less than thirty-three thousand inhabitants constitute the third grade, and those which have more than five thousand and less than ten thousand constitute the fourth grade.¹

Villages are divided into two classes—first and second. Those having more than three thousand and less than five thousand inhabitants are villages of the first class; those having more than two hundred and less than three thousand inhabitants are villages of the second class. Hamlets, when organized, must have at least fifty electors.²

Sec. 838. Municipal corporations organized from unincorporated territory.—There is no statutory provision in Ohio for the organization of cities from unincorporated territory, even though the territory contains the requisite number of inhabitants for a city. Municipal corporations are first organized as villages or hamlets, and afterwards, when the population is sufficient, may be advanced to cities of the second class, and from cities of the second to cities of the first class; they do not advance by mere increase of population, but certain steps must be taken.³ A village or hamlet may be organized in the following manner: The territory proposed to be incorporated must first be platted in the manner or be of the character required by statute.⁴ The initial step is taken

¹ Secs. 1547 and 1548, R. S., as amended Feb. 10, 1892 (89 O. L. 18).

² State ex rel. v. Wall, 47 O. S. 490.

³ R. S., sec. 1553.

⁴ R. S. secs. 1549, 1551.

by filing with the county commissioners a map of the territory and a petition signed by not less than thirty electors residing within the district proposed to be incorporated. The petition must contain an accurate description of the territory, the supposed number of inhabitants, not less than two hundred if a village, and not less than fifty electors if a hamlet is desired, a request that the corporation be either a village or hamlet, the name proposed, and the name of some person to act as agent for the petitioners. There is an exception in respect to the number of inhabitants required where the territory is an island or islands.¹

Sec. 839. Form of petition to incorporate village.—

Before the County Commissioners of — County, Ohio.
 In the Matter of the Incorpora- }
 tion of the Village of —. } Petition.
 To the Honorable Board of Commissioners of — County,
 Ohio:

Your petitioners represent to your honorable body that they desire to obtain an order for the organization of a village in the territory hereinafter described, and state that each of the thirty persons whose names are subscribed to this petition are electors and *bona fide* residents and inhabitants of the territory proposed to be incorporated. [*R. S., sec. 1554.*]

That "an accurate description of the territory embraced within the proposed corporation" [*R. S., sec. 1503*] is as follows: [*Description of territory.*]

Your petitioners represent that a plat of said territory has been acknowledged and recorded in volume — of the Records of Plats of said county [*or, that said territory has been laid off into lots, surveyed and platted, and a plat thereof duly recorded in Record of Plats of said county, volume —, page —*], [*R. S., sec. 1553*], and "an accurate map of the territory" is filed herewith. [*R. S., sec. 1554.*] Said territory is not adjacent to a city, nor a part of an island or islands. [*R. S., sec. 1553.*]

That "the supposed number of inhabitants residing in the proposed corporation" is [*or, that the proposed number of inhabitants residing in the above territory sought to be incorporated into a village is about —, and not less than two hundred*]. [*R. S., sec. 1553.*]

Your petitioners have appointed A. B. and authorized him to act as their agent in this behalf [*R. S., sec. 1555*], and pray that your honorable board do, upon a hearing hereof, cause to be entered on your journal an order [*R. S., sec. 1558*] in-

¹ R. S., secs. 1553, 1554, 1555.

incorporating the above described territory into a village under and by the name of — [*name proposed. R. S., sec. 1555*].

NOTE.—The foregoing petition depends entirely upon the statute and must be drawn in strict accord with its provisions in order to lay before the commissioners all facts essential to be known by them. These have been arranged in their order in the above petition with references to the various sections of the statutes following, the matter quoted being in the direct language of the statute, to which there can be no objection. Section 1554 provides what the petition shall contain, but section 1558 makes other requirements as conditions precedent to the organization which must be considered by the board, and therefore may be properly stated in the petition.

Sec. 840. Filing and notice of petition.—The petition for the incorporation of a city or village must be presented at a regular session of the commissioners, who are required to set a time and place for hearing the same, which shall not be less than sixty days after it is filed. Notice containing the substance of the petition, and the time and place of hearing, must be published in a newspaper printed and of general circulation in the county for a period of six weeks. A copy of such notice must also be posted in a conspicuous place within the limits of the proposed corporation at least six weeks before the hearing.¹

Sec. 841. Hearing and order.—At the time fixed for hearing, or at the time to which the hearing is adjourned, the commissioners either allow or reject the petition. If the petition is allowed, the commissioners shall place upon their journal an order in conformity to statute.² At the earliest time practicable after granting the prayer of the petitioners, it is the duty of the commissioners to transmit to the county recorder a certified transcript of their proceedings, the petition, map and all other papers on file pertaining to the incorporation. At the expiration of sixty days after receiving them, the recorder, unless enjoined, shall make a record of the petition, transcript and map. The recording of these documents by the recorder is the final step in the creation of the corporation.³ The decision of the commissioners on the merits of the case is final, except as it may be reviewable on error for errors or inaccuracies.⁴

¹ R. S., sec. 1556. The form of the notice may easily be drawn by taking the essential points in the petition and incorporating them into the notice.

² R. S., sec. 1558.

³ R. S., secs. 1560, 1561.

⁴ *Hulbert v. Mason*, 29 O. S. 562.

Sec. 842. Proceeding to enjoin organization.— After the filing of the papers with the county recorder, and before sixty days has elapsed, the first litigation in chronological order in which the corporation is involved may arise. The discretion of the commissioners in organizing the corporation is not reviewable. The court may enjoin the proceeding for errors or inaccuracies of the boundaries at the suit of a party interested. Any person showing a substantial interest in the matter may bring the suit. Only errors in the proceedings and inaccuracies in the boundaries can be complained of. It partakes of the nature of a proceeding in error.¹ A summons does not necessarily issue on the petition, but the person filing the same must give notice in writing to the recorder and the agent of the petitioners that the petition has been filed.² Thereupon the recorder files with the court all the papers in his possession relating to the incorporation. The case is heard on the papers and testimony in a summary manner. If the suit is dismissed, the papers are returned to the recorder and are by him recorded, which act completes the incorporation. But if the court enjoins the recorder from making the record, the incorporation cannot be created under this proceeding, though it is not a bar to a subsequent application to the county commissioners.³

Sec. 843. Form of petition to enjoin organization of village.—

Court of Common Pleas, — County, Ohio.

In the Matter of the Proceed- ings to Incorporate the Village of —.	} Petition for Injunction.
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Your petitioner respectfully represents to the court that on the — day of —, 18—, certain electors residing within the territory situate in — township, county of —, Ohio, and described as follows [*describe territory*], filed with the county commissioners of said county a petition asking for an order authorizing said territory to be incorporated into a village to be known by the name of the village of —. Thereafter, to wit, on the — day of —, 18—, the commissioners of said county, at a hearing of said petition, made a pretended

¹ R. S., sec. 1562; *Hulbert v. Mason*, 29 O. S. 562. No appeal can be taken therefrom. *Id.* It cannot be collat-

erally impeached. *Blanchard v. Bisell*, 11 O. S. 96.

² R. S., sec. 1563.

³ R. S., sec. 1564.

order organizing said village of —, and thereupon sent a certified transcript of their proceedings in relation thereto, together with the petition therefor, and all maps and papers with reference thereto, to — —, county recorder of — county, for record, and the same are now in his possession and he is about to and will record the same, to the great and irreparable injury of your petitioner, who is a resident and tax-payer of said territory, unless restrained by the order of this honorable court.

Your petitioner states that there is error and inaccuracies in said proceedings before the county commissioners in this, to wit: [*State specifically errors complained of, as:*]

The territory proposed to be incorporated into said village adjoins the city of — for the distance of — feet. [*R. S., sec. 1553.*]

That said territory, proposed to be incorporated, embraces within its limits the grounds and improvements of the county infirmary of the county of —. [*R. S., sec. 1553.*]

[*Other errors.*]

Your petitioner therefore asks that — —, recorder of said county, may be restrained from making a record of said proceedings and from certifying transcripts thereof to the secretary of state and to — —, the agent of the petitioners.

NOTE.—The recorder must, upon being notified of the proceeding, transmit to the clerk all papers relating to the matter. *R. S., sec. 1563.* A transcript, therefore, need not be filed with the petition.

Sec. 844. Nature of injunction proceedings.—This proceeding is of a peculiar nature. The petitioner is required upon the filing of his petition to file with the recorder and agent selected by the petitioners a notice in writing. It is thereupon made the duty of the recorder of the county upon receiving the notice of the filing of the petition to forthwith transmit to the clerk of the court where the petition for injunction is pending, all the papers relating to the incorporation on file in his office.¹ This is for the purpose of furnishing the court with all the necessary information, so that it is unnecessary to accompany the petition with a transcript.² The recorder must not then make a record unless the injunction is denied.³ The court is required to hear the petition in a summary manner, and to dismiss it if no error or inaccuracies are found. But if error is found, or the boundaries are so in-

¹ *R. S., sec. 1563.*

² *R. S., sec. 1563.*

³ See form *ante*, sec. 843.

accurately defined as to render the limits of the proposed corporation uncertain, then the court should grant the injunction.¹

Sec. 845. Annexation of territory.—Municipal corporations may be enlarged by the annexation of adjacent property. This is done in two ways. A majority of the adult freeholders residing in the territory proposed to be annexed may petition the county commissioners for the annexation of the same to a municipal corporation to which such territory is contiguous. The same proceeding is had upon such petition as upon a petition for the organization of a municipal corporation, except the transcript and map are sent to the clerk of the corporation to which the territory is proposed to be annexed.² At the expiration of sixty days, if he has not been enjoined, the clerk lays the transcript and other papers before the council for its acceptance or rejection. The territorial area of a municipal corporation cannot be enlarged except by the consent of the corporation and the county commissioners. During the sixty days that the papers must remain with the clerk, an injunction may be brought against him the same as against a county recorder in the case of the incorporation of a village or hamlet. If the suit is dismissed he can transmit the papers to the council for its action; if the injunction is made perpetual, the annexation is defeated, but this is not a bar to another application.³ The legislature cannot constitutionally annex territory by special act,⁴ but it may detach it.⁵

The initial step in the annexation proceeding may be taken by the passage of an ordinance authorizing the same. In such case the application is made by the city solicitor to the county commissioners by petition, and the same proceedings are had as when the application is made by the freeholders of the territory. The form of the petition to enjoin the annexation of territory may be similar to that enjoining the organization of a village or hamlet.

Sec. 846. Change of name of village or hamlet.—The name of a village or hamlet may be changed by twelve or more freeholders of the corporation subscribing a petition therefor, and filing the same in the court of common pleas of

¹ R. S., sec. 1564.

² R. S., secs. 1589, 1590.

³ R. S., secs. 1591-1596.

⁴ State ex rel. v. Cincinnati, 20 O. S. 18.

⁵ Metcalf v. State ex rel., 49 O. S. 536.

the county in which the corporation, or the larger part thereof, is situated.¹

Sec. 847. Form of petition for change of name of village.

Your petitioners, twelve in number, state that they are freeholders residing in the village of —, which is a municipality organized under the laws of Ohio, and situated entirely within the county of — and state of Ohio.

Your petitioners state "that at least three-fourths of the inhabitants of said corporation desire" that the name of said village be changed from [*present name*] to [*name desired*], "and that there is no other municipal corporation in the state with the name of — as prayed for." [*State reasons for change.*]

Your petitioners therefore ask the court to make an order to change the name of said corporation from — to —.

NOTE.—The foregoing form is substantially in the language of the statute, as indicated by quotations. R. S., sec. 1570.

Sec. 848. Notice and hearing of petition for change of name.—Thirty days' notice in a newspaper of general circulation in the corporation must be given by the petitioners of the object of the petition, and of the time and place where the petition will be heard. Before the notice is published it will be prudent to draw the court's attention to the filing of the petition, and request it to fix the time and place for hearing the same, and have the order therefor entered on the journal. At the hearing, if the court is satisfied by proof that the prayer of the petitioners is just and reasonable, that notice has been given, that at least three-fourths of the inhabitants of the corporation desire the change, and that there is no other municipal corporation in the state of the new name, it may order such change to be made.² There is no statutory provision for the change of the name of a city.

Sec. 849. Advancement of hamlets, villages and cities.—Elaborate provision is made by statute for advancing hamlets to villages, villages to cities, cities of the second class to cities of the first class.³ There is no statutory provision for enjoining a municipal corporation from assuming to act in any grade or class to which it has attempted to advance itself. There is no statutory provision similar to those which provide for an injunction in the case of the organization of a village or hamlet, or the annexation of territory. The state itself is the

¹ R. S., sec. 1570.

² R. S., secs. 1546-51, 1572-88.

³ R. S., secs. 1570, 1571, 5554.

only body which can complain of a municipal corporation assuming to act under a government to which it is not entitled.¹ A municipal corporation does not advance from one class to another simply by an increase in population. In order to advance the city, its inhabitants and officers must take the steps required by statute.²

Sec. 850. Averment of corporate capacity — Grade and class.— In all cases, whether brought by or against a municipal corporation, the petition should contain an averment that the plaintiff or defendant, as the case may be, is a municipal corporation. Otherwise it would not appear whether the party had the capacity to sue or be sued.³ There should be a further averment as to whether the corporation is a city or village, and the grade or class to which it belongs. Many laws are passed which apply to only one grade or class, and if suit is brought under such a law, it should appear that the corporation involved belongs to that grade or class. Whether the court takes judicial notice of the grade and class to which a municipal corporation belongs is not well settled.⁴ It is sufficient if the pleader aver that the plaintiff or defendant is a municipal corporation duly organized under the laws of the state of Ohio as a city or village or hamlet of the — grade of the — class.

Sec. 851. Constitutionality of laws and ordinances relating to municipalities, how raised.— At each session of the legislature laws are enacted pertaining to cities and villages, and the councils of the latter are constantly engaged in passing ordinances the constitutionality of both of which is frequently questioned. The practitioner may be of the opinion that a law or ordinance is unconstitutional, but at a loss to know how to procure the opinion of a court upon the question. The constitutionality of a law relating to a city or village, or an ordinance or proceeding thereof, may be brought before a court of competent jurisdiction by *quo warranto*,⁵

¹ Dillon, Mun. Corp. 48 A.

² State ex rel. v. Wall, 47 O. S. 499.

³ R. S., sec. 1552.

⁴ R. S., sec. 1787; Bolton v. Cleveland, 85 O. S. 319-321; State ex rel. v. Constantine, 42 O. S. 437-444.

⁵ State ex rel. v. Schwab, 49 O. S.

229; State ex rel. v. City of Toledo,

48 O. S. 112; State ex rel. v. Smith,

48 O. S. 211; State ex rel. v. Wall, 47

O. S. 499; State ex rel. v. Hawkins,

44 O. S. 98; State ex rel. v. Hudson,

injunction,¹ *mandamus*,² suit on contract or assessment,³ action for damages,⁴ *habeas corpus*.⁵

The averments in a pleading alleging the unconstitutionality of a law pertaining to a municipal corporation may be made in any appropriate language. There is no stereotyped form for such allegations. The numerous objects of laws relating to municipal corporations and the diversity of their language make it impossible to adopt a set form for all cases. It is sufficient if a party alleges that the act on which his antagonist relies is unconstitutional or null and void or inoperative for the reason that it is in conflict with either the state or federal constitution, or both, pointing out definitely the sections and articles of either with which he claims the act conflicts.⁶

While, as before stated, it may be difficult to give a set formula fitting all cases, yet there are a few allegations which should be carefully made. In this, as in other actions, the writer believes that the averments should unequivocally direct the court's attention, as well as that of his adversary, to the grounds upon which he relies. A statement of a cause of action in cases of this character is different from others, yet the rules of pleading with respect to a statement of facts should not be

44 O. S. 137; State ex rel. v. Anderson, 44 O. S. 247; State ex rel. v. Smith, 44 O. S. 348; State v. Pugh, 43 O. S. 98; State ex rel. v. Constantine, 43 O. S. 487; State v. Baughman, 38 O. S. 455; State ex rel. v. Covington, 29 O. S. 102.

¹ Parsons v. Columbus, 50 O. S. 460; Costello v. Wyoming, 49 O. S. 202; Street Railway v. Cummins, 14 O. S. 524, 546, 547; Tone v. Columbus, 39 O. S. 281; Kumler v. Silsbee, 38 O. S. 445; Freeman v. Hunter, 7 O. C. C. 117. Injunction may be employed by an officer against an adverse claimant whose title is in dispute on the ground that the law under which he claims to hold is unconstitutional. Reemelin v. Mosby, 47 O. S. 570.

² Metcalf, Auditor, v. State ex rel.,

49 O. S. 586; State ex rel. v. Circleville, 20 O. S. 362.

³ Corry v. Campbell, 25 O. S. 184-142; Bonsall v. Town of Lebanon, 19 O. S. 418; Welker v. Potter, 18 O. S. 85; Maloy v. City of Marietta, 11 O. S. 324; Northern Indiana R. R. Co. v. Connelly, 10 O. S. 161; Hill v. Higdon, 5 O. S. 243; Ernst v. Kunkle, 5 O. S. 521; Ridenour v. Saffin, 1 Handy, 464, 469-478.

⁴ Toledo v. Preston, 50 O. S. 361.

⁵ Sipe v. Murphy, 49 O. S. 536; Ex parte Clamp, 16 Bull. 229. But see Madden v. Smeltz, 2 O. C. C. 168; Ex parte Mosler, 8 O. C. C. 324.

⁶ For forms, see Costello v. Wyoming, 49 O. S. 204; Toledo v. Preston, 50 O. S. 361; Walker v. Cincinnati, 21 O. S. 23; Reemelin v. Mosby, 47 O. S. 570; State v. Pugh, 48 O. S. 100.

different. A number of cases have been examined in which careful lawyers have prepared petitions of this character to which reference has been made in a note.¹ But they do not seem to be sufficiently specific. The rules of pleading statutes may not apply in all their force to this class of actions. For example, it may not be necessary to plead a general statute, because judicial notice is taken of it.² Yet it is the better practice, in attacking the constitutionality of a law of this character, to point out the particular features of the law claimed to be invalid, alleging so much of its provisions as may seem appropriate to bring the questions properly before the court, pointing out the particular provisions of the constitution with which it conflicts. Realizing the importance of pleading in such actions — for constitutional questions are grave — forms are inserted in the sections following.

Sec. 852. Same continued — By quo warranto.— The constitutionality of a law relating to a municipality may be raised by *quo warranto* when the corporation,³ a board⁴ or officer⁵ thereof is exercising powers conferred thereby. When additional powers are conferred upon a municipal board by an unconstitutional statute, it may be ousted from performing such duties.⁶ The right of a board which has been appointed by a mayor to hold office may be questioned in this manner.⁷ An officer elected by the electors of a city may be ousted if the law creating the office which he assumes to hold is unconstitutional.⁸ The constitutionality of an act which abolishes a board of public works and creates a board of public affairs, which is its successor, may be tried by *quo warranto*.⁹ This is an appropriate remedy to oust a police judge claiming to hold under an unconstitutional law,¹⁰ or officers not having the proper qualification of electors.¹¹ Where the legislature has annexed territory to a city by a special act,

¹ See sec. 852, p. 811, n. 5.

² *Ante*, sec. 53.

³ *State ex rel. v. Cincinnati*, 20 O. S. 19; *State, etc. v. Cincinnati*, 28 O. S.

447; *State ex rel. v. Toledo*, 48 O. S. 112.

⁴ *State ex rel. v. Wall*, 47 O. S. 499.

⁵ *State ex rel. v. Schwab*, 49 O. S.

239.

⁶ *State v. Pugh*, 48 O. S. 98.

⁷ *State ex rel. v. Wall*, 47 O. S. 499.

⁸ *State ex rel. v. Schwab*, 49 O. S.

239.

⁹ *State ex rel. v. Smith*, 44 O. S. 348.

¹⁰ *State ex rel. v. Anderson*, 44 O. S.

247.

¹¹ *State ex rel. v. Rust*, 4 O. C. C. 329.

such corporation may be ousted from extending its municipal government over such territory by *quo warranto*.¹ A board of police commissioners may be ousted who have intruded into² or been duly removed from office by the governor,³ or not duly elected⁴ or appointed.⁵ *Quo warranto* is used in many cases other than those in which constitutional questions are raised against municipal corporations, their boards and officers,⁶ but not to decide between rival claimants to a municipal office, where the statute provides other means of determining such controversies.⁷

Sec. 853. Same continued — Petition to test constitutionality of law by *quo warranto*.—

SUPREME COURT OF OHIO.

The State of Ohio, on the Relation of D. K. W., Attorney-General, Plaintiff, vs. W. M. W., etc., Defendants.	}	Petition.
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D. K. W., the attorney-general of the state of Ohio, upon complaint to him in that behalf made, comes and gives the said court to understand and be informed, and avers that the city of —, in the county of —, and state of Ohio, is a municipal corporation duly organized under the laws of the state of Ohio, and that the defendants, W. M. W., etc. [*naming them*], are unlawfully assuming to exercise, and are unlawfully exercising, and for several days last past have unlawfully assumed to exercise, and have unlawfully exercised, within the state of —, to wit, in the said city of —, the following franchises, to wit:

1. To act as a board of public works in said city of —; and
2. To supervise the cleaning, lighting, repairing and improvements of the streets, alleys, avenues, lanes, public wharves

¹ State ex rel. v. Cincinnati, 20 O. S. 26; State ex rel. v. Cincinnati, 28 O. S. 446.

² State ex rel. v. Covington, 29 O. S. 102. ⁴ State ex rel. v. Green, 37 O. S. 227; State v. Heinmiller, 88 O. S. 101;

³ State ex rel. v. Hawkins, 44 O. S. 98. State ex rel. v. Kearns, 47 O. S. 566; State ex rel. v. O'Brien, 47 O. S. 464;

⁴ State v. Constantine, 42 O. S. 487. State ex rel. v. Anderson, 45 O. S.

⁵ State v. Baughman, 88 O. S. 455. 196; State ex rel. v. Bryson, 44 O. S. 457.

For forms of pleading see State ex rel. v. Cincinnati Gas-Light & Coke Co., 18 O. S. 263; State ex rel. v. Cincinnati, 20 O. S. 26; State ex rel. v. Berry, 47 O. S. 282. See *ante*, secs. 536-542.

and landings, market-houses and spaces, bridges, sewers, drains, ditches and culverts in said city of —; and

3. To have seats in the council of said city of —, and to take part in the proceedings and deliberations of said council on questions within the exclusive prerogative and power of said council; and

4. To make and execute contracts in the name and on behalf of said city of — for the execution of public work in and for said city, and to purchase material therefor and to bind said city by such contracts, and to make an estimate of the cost of such work or material; and [*here point out such other separate powers conferred by the act briefly and not in the language of the statute*].

Plaintiff prays for the advice and judgment of the court here in the premises, and that the defendants be compelled to answer to the state of Ohio by what warrant they claim to exercise the franchises aforesaid, and that they be ousted from exercising the same.

D. K. W.,

Attorney-General of the State of Ohio.

Sec. 854. Same continued — Answer in quo warranto.—

Now come the defendants herein, W. M. W., etc. [*naming them*], and, for their answer to the petition herein, admit that the city of —, in — county, Ohio, is a municipal corporation organized under the laws of said state. Said defendants aver that said city is, and was at the times hereinafter stated, a city of the — grade of the — class, organized under the laws of the said state; that on the — day of —, 18—, the general assembly of said state duly passed an act entitled “An act to create a board of — in, and making certain change in, the government of cities of the — grade of the — class,” which took effect and was in force from and after its passage; that at the times hereinafter stated one P. H. B. was the duly elected, qualified and acting mayor of said city; that on said — day of —, 18—, after the passage and taking effect of said act, said P. H. B., acting as such mayor, pursuant to said act, duly appointed said defendants members of the board of — said city, as follows: The defendant W. M. W. a member of said board for the term of — years next ensuing after said — day of —, 18— [*naming terms of other members*]; that the defendants on said day severally accepted said appointments; that at the time of their said appointments said defendants were, and continually since then have been, electors of said city; that said defendants, according to law, on said — day of —, 18—, and prior to entering upon their duties as members of said board, severally took an oath of office and gave and filed a bond to said city with sureties according to law, to the satisfaction and approval of said mayor, in the sum of — dollars, conditioned for the

faithful performance of their duties as members of said board; that the defendants, since the time of their said appointment and qualification, have exercised the powers and performed the duties mentioned and described in, and conferred and authorized by, said act.

And said defendants, further answering herein, deny each and every allegation in said petition contained not herein specifically admitted.

Wherefore said defendants pray that they may go hence without day.

Sec. 855. Same continued — Reply in quo warranto.—

For reply to the answer of the defendants herein the plaintiff charges and submits that said act mentioned therein is not a valid law of this state for the reason that it is in conflict with and repugnant to the constitution of the state of Ohio and the constitution of the United States. Said act is void because it is in contravention of the constitution of the state of Ohio in the following particulars:

I. Said act purports to be a law of a general nature, but does not have a uniform operation throughout the state, and therefore violates section 26 of article 2 of the constitution.

II. Said act is a special act applicable to the city of — only, and confers corporate powers, and it therefore violates section 1, article 13, of the constitution.

Said act is void because it is in contravention of the constitution of the United States in the following particulars:

III. Said act is in conflict with and repugnant to section 10, article 1, of the constitution of the United States, for the reason that it impairs the obligation of a contract, to wit: [*Here describe the contract.*]

IV. Said act is in conflict with and repugnant to the fourteenth amendment of the constitution of the United States for the reason that it deprives persons of property without due process of law.

Wherefore plaintiff prays that said act may be declared unconstitutional, null and void and that the defendants may be ousted from exercising the liberties, privileges, franchises and powers mentioned and described in the petition herein.

Sec. 856. Same continued — By injunction.— Injunction is an appropriate proceeding to raise the question of the constitutionality of a law relating to a municipal corporation, when some private right is affected, like the exaction of a license fee, the levying of a tax or assessment under an invalid law.¹ It may be a question whether an injunction will lie to

¹ *Cleveland v. Heisley*, 41 O. S. 670; *Costello v. Wyoming*, 49 O. S. 202; *Walker v. Cincinnati*, 21 O. S. 14.

restrain a city council from passing an ordinance levying a tax under an unconstitutional law, as such action might be considered as interfering with legislative discretion. But a city clerk may be restrained from certifying such an ordinance to the county auditor, and the latter from placing the tax on the duplicate, as their acts are only administrative. A property owner may restrain the collection of an assessment levied upon his property under an unconstitutional act,¹ if he is not estopped;² but he cannot, except as a tax-payer,³ restrain the making of the improvement for which the assessment is laid, unless the work is on his own property.⁴ A city solicitor, or a tax-payer after having requested the city solicitor in writing, may bring a suit for an injunction on behalf of the corporation to test the constitutionality of a law authorizing an improvement, the letting of a contract, the levying of a tax or an assessment.⁵

Sec. 857. Same continued — By mandamus.— When duties are imposed upon a municipal officer by laws which conflict with the organic law of the state, usually the officer is under obligation to disregard the law and respect the constitution. He may be mistaken in his opinion of the conflict, or be erroneously advised. By an action in *mandamus* the question may be raised whether the law imposing the duty upon him is inhibited by the constitution.⁶ If a law is enacted which creates a municipal board or office, and requires the mayor to appoint the members or the officer, he may decline on the ground that the law is unconstitutional. In such case, an action in *mandamus* may be brought by a person interested and authorized to compel him to perform his duty. The mayor can plead the unconstitutionality of a law as a defense. He may make the appointment, and the board or officers may be called upon by the state to show by what authority they hold the office. The board or officers answer, setting

¹ *Scovill v. Cleveland*, 1 O. S. 126, 127; *Wright, Treasurer, v. Thomas*, 26 O. S. 346.

² *Columbus v. Sohl*, 44 O. S. 479; *Tone v. Columbus*, 39 O. S. 281.

³ *R. S.*, secs. 1777, 1778; *post*, sec. 872.

⁴ *Kellogg v. Ely*, 15 O. S. 64.

⁵ *R. S.*, secs. 1777, 1778; *post*, sec. 872.

⁶ *Metcalf, Auditor, v. State ex rel.*, 49 O. S. 586; *State ex rel. v. Circleville*, 20 O. S. 362.

out the passage of the law and their appointment. The state by reply sets out that the law under which the defendant claims to act is unconstitutional. A demurrer to the reply brings the question before the court. It may be, under the peculiar circumstances of a case, proper for a municipal officer to perform a duty enjoined upon him by an unconstitutional law, and he may be compelled by *mandamus* to act.¹

Sec. 858. Same continued — By contracts and assessments under unconstitutional laws.— Contracts entered into by a municipal corporation, which purport to be authorized by an unconstitutional law, are wholly invalid, and no action can be maintained thereon.² Assessments levied by virtue of an act inhibited by the constitution are wholly invalid,³ and cannot be collected unless the assessment-payer by his conduct is estopped. The constitutionality of a law is frequently raised in an action on a contract or an assessment.⁴ An assessment is usually the result of a contract. Our assessment laws provide for the assignment to the contractor of an assessment as pay for his contract.⁵ If the city, or its assignee the contractor, undertakes to foreclose the lien of an assessment, the assessment-payer may defend on the ground of the unconstitutionality of the law purporting to authorize the assessment.⁶ If the city undertakes to collect the assessment by placing the same on the tax duplicate, the assessment-payer may bring a suit to restrain its collection on the same ground.⁷

Sec. 859. Municipality — When not liable in damages.— It is sometimes difficult to determine when a city or village may and when it may not be held liable for damages occasioned by the tortious acts of its officers, agents or employees. Municipal corporations act in a dual capacity.⁸ The statutes confer upon them two distinct classes of powers — one governmental and political, the other private and proprietary.

¹ State ex rel. v. Mitchell, 81 O. S. Columbus, 89 O. S. 281; Ulster v. Springfield, 49 O. S. 88-100.

² Hill v. Higdon, 5 O. S. 243; Ma-loy v. Marietta, 11 O. S. 324.

³ R. S., sec. 2303.

⁴ Wright, Treasurer, v. Thomas, 26 O. S. 346.

⁵ Northern Indiana Railroad Co. v. Connelly, 10 O. S. 160.

⁶ Hill v. Higdon, 5 O. S. 243; Ma-loy v. Marietta, 11 O. S. 324; Parsons v. Columbus, 50 O. S. 460; Tone v.

⁷ Parsons v. Columbus, 50 O. S. 460.

⁸ Cincinnati v. Cameron, 33 O. S. 336, 366, 369; Toledo v. Cone, 41 O. S. 149, 159, 162.

In the one class the state delegates a part of its sovereign power to its local minor bodies organized as municipal corporations. The state finds it more convenient to exercise some of its powers of sovereignty, such as those relating to police, fire and health departments, through local authority than a centralized government. A suit cannot be maintained against a city for its unlawful acts or negligence while acting as the agent of the state in matters pertaining to the police, fire, health or similar departments. The duty of maintaining these departments is by the legislature thrust upon cities and villages, and for their unlawful acts in respect thereto they are no more responsible than the state itself.¹

Sec. 860. When liable for damages.—The second class of powers referred to in the preceding section which the legislature has conferred upon municipal corporations is of a private proprietary character, such as the maintenance of water-works, libraries, hospitals, parks. Such institutions and property are public as between the inhabitants of the corporation, but private as against the rest of the world. For negligence or unlawful acts in respect thereto² *infra vires*, for the violation of contracts,³ the invasion of private property,⁴ the neglect of an imposed duty,⁵ the corporation is liable the same as

¹Insufficient fire department. *Wheeler v. Cincinnati*, 19 O. S. 19. Property destroyed by mob. *Western College v. Cleveland*, 12 O. S. 375. Personal injury by firing cannon in street. *Robinson v. Greenville*, 42 O. S. 625. Damages arising from failure to enforce ordinance against storing oil. *Roberts v. Cincinnati*, 5 Am. L. Rec. 73 (Sup. Ct., Gen. Term). Personal injury by fire department. *Thomas v. The City of Findlay*, 6 O. C. C. 241. See generally, *Commissioners v. Mighels*, 7 O. S. 109; *Finch v. Board of Education*, 30 O. S. 37; *Biehm v. Cincinnati*, 25 O. S. 305. Cases near the dividing line. *City of Toledo v. Cone*, 41 O. S. 149; *Johns v. Cincinnati*, 45 O. S. 279. For copies of petitions in such cases to which demurrers were sustained, see *Finch*

v. Board of Education, 30 O. S. 37; *Robinson v. Greenville*, 42 O. S. 626. For copy of petition to which demurrer was sustained and afterwards overruled on rehearing, see *Toledo v. Cone*, 41 O. S. 149.

²*Toledo v. Cone*, 41 O. S. 149; *Dayton v. Pease*, 4 O. S. 80; *Rhoades v. Cleveland*, 10 O. 160; *Goodloe v. Cincinnati*, 4 O. 500.

³*Cincinnati v. Cameron*, 33 O. S. 336.

⁴*Johns v. Cincinnati*, 45 O. S. 278; *Akron v. McComb*, 18 O. 229; *Cincinnati v. Whetstone*, 47 O. S. 196; *Youngstown v. Moore*, 30 O. S. 133; *Columbus v. Williard*, 7 O. C. C. 113; *Keating v. Cincinnati*, 38 O. S. 141; *Crawford v. Delaware*, 7 O. S. 459; *Akron v. Chamberlain Co.*, 34 O. S. 328.

⁵*Steubenville v. McGill*, 41 O. S.

a private corporation or an individual. The pleadings in actions for damages against a municipal corporation are substantially the same as in other cases. There are a few exceptions arising out of statutory provisions and those necessarily peculiar to cities and villages to be noticed hereafter.¹

Sec. 861. Liability for failure to keep street in repair.— There is an exception to the rule that cities and villages are not liable for negligence in the exercise of governmental or political powers. Laying out, acquiring land for, either by purchase or appropriation, or improving and repairing public highways, is the exercise of sovereign power; but when this power is exercised in respect to streets, avenues and highways of a city or village, it partakes of a local character, and so many property rights are affected thereby that the legislature has conferred these powers on municipal corporations, and imposed upon them the duty of keeping the highways within their corporate limits open, in repair, and free from nuisance. The failure to perform this duty renders the corporation liable for damages flowing therefrom.²

Sec. 862. Petition for injury sustained by failure to keep street in repair.—

Defendant is a municipal corporation duly organized under the laws of the state of Ohio, as a city of the — grade of the — class. That there is a certain street in the said city called — street, which is one frequently traveled by the general public. That on the — day of —, 18—, said street was negligently allowed to become and was out of repair, and at a point thereon, between — street and — street, there was a dangerous hole therein, about — feet deep, of which the defendant had notice, or might have had notice by due diligence, and failed and neglected to improve the same for the space of — days.

[*Or*, That on the — day of —, 18—, the defendant con-

285; Circleville v. Neudling, 41 O. S. 465; Ironton v. Kelly, 38 O. S. 50; Steubenville v. King, 28 O. S. 610; Boyd v. Cambridge, 4 O. C. C. 519; Ashtabula v. Bartram, 8 O. C. C. 640; O. S. 549; Cardington v. Adm'r of Cardington v. Adm'r of Fredrick, 46 O. S. 442; Shelby v. Clagett, 46 O. S. 549.

¹ Post, sec. 864.

² R. S., sec. 2640; Steubenville v. King, 28 O. S. 610; Ironton v. Kelly, 38 O. S. 50; Circleville v. Neudling, 41 O. S. 465; Shelby v. Clagett, 46 O. S. 549; Cardington v. Adm'r of Cardington v. Adm'r of Fredrick, 46 O. S. 442; Steubenville v. McGill, 41 O. S. 285; Boyd, Adm'r, v. Cambridge, 4 O. C. C. 519; Ashtabula v. Bartram, 8 O. C. C. 640.

tracted with R. F. to improve and grade said street, and in so doing a large and dangerous excavation was made therein.]

That on the — day of —, 18—, and for a period of — [state how long], said hole [or, excavation] said defendant negligently allowed to remain open, exposed and without lights or guards.

On the night of the — day of —, 18—, plaintiff was passing along said street, and by reason of said hole being so negligently left open and unguarded, accidentally fell into said hole [or, over said excavation], whereby he was greatly injured [state injuries].

Wherefore the plaintiff has sustained damages by reason of the foregoing premises in the sum of — dollars.

[Prayer.]

NOTE.— See *Groveport v. Bradfield*, 2 O. C. C. 145; *Cardington v. Fredericks*, 46 O. S. 442; *Shelby v. Clagett*, 46 O. S. 549. An abutting lot-owner is not liable for an injury to a person caused by stepping through a defective sidewalk (*Sammins v. Wilhelm*, 6 O. C. C. 565), but otherwise if he placed the obstruction in the street.

Sec. 863. Petition for injury caused by an obstruction in the street.—

[Caption and averment of corporate character of defendant.]

That on the — day of —, 18—, there was and has been a certain public street in said city [or, village] called and known as M. street, which said street was and is traveled and used by the citizens of said city [or, village] and public generally.

That the defendant, well knowing the premises, on or about the — day of —, 18—, wrongfully and negligently placed large quantities of brick and other materials in said street, and so negligently permitted the same to remain there for a period of —, and until the time of the occurrences herein-after mentioned.

That on the — day of —, 18—, said brick and other materials were so negligently exposed in said street by said defendant without lights and guards, and of which said defendant had due notice, and while this plaintiff was on the — day of —, 18—, lawfully passing and traveling along and upon said street in the night time,* in a carriage belonging to plaintiff, he was driven against said brick and other materials, and said carriage was thereby overturned and broken, and the plaintiff thrown out and [state injuries, if any], [or, if on foot, from *], he accidentally and without fault on his part stepped upon one of said piles of bricks, and was precipitated thereon], whereby the plaintiff suffered great pain and anguish of body and mind, and was compelled to pay the sum of \$— for medical services and medicines in being cured of his injury; and was unable to attend to his business for the space of — months, and was compelled to pay for repairing said carriage

the sum of \$——, in all to the plaintiff's damage in the premises in the sum of \$——, for which he prays judgment.

NOTE.—A petition is bad on demurrer if it does not aver that the corporation negligently caused the obstruction. *Groveport v. Bradfield*, 2 O. C. C. 145. Or notice, or facts from which notice may be inferred, must be averred. A municipal corporation is not an insurer against accidents in streets. *3 Dillon, Munic. Corp.* 917.

Sec. 864. Damages from change of grade — Generally.—

Actions for damages for the change of grade of highways are peculiar to municipal corporations. Recently it has been held that the same liability attaches to county commissioners.¹ The ground upon which a city or village is rendered liable for damages for the change of an established grade of a highway is that the bounding or abutting property holder who has made improvements on his property in reference to such grade has an easement—a private right of access to and from his property—in the street different from the public, for which he is entitled to be compensated if impaired or destroyed.² This easement is in the nature of an incorporeal hereditament appendant to the bounding and abutting property and the improvements thereon.³ This right of access to and from the street is as much property as the lot itself, and cannot justly be taken by the public without compensation therefor.⁴ The right to recover damages for a change of grade is based on the constitutional guaranty that private property shall be held inviolate, and when taken for public use compensation shall be made therefor.⁵

Sec. 865. When damages for change of grade may be recovered.—An abutting property holder whose property has been improved may recover damages for a change of grade

¹ *Smith v. Commissioners*, 50 O. S. 38 O. S. 41; *Johns v. Cincinnati*, 45 628; *Cheseldine v. Commissioners*, 6 O. S. 278-281; *Cincinnati v. Whetstone*, 47 O. S. 196; *Cohen v. Cleveland*, 43 O. S. 190.

² *McComb v. Akron*, 15 O. 475; *Street Railway v. Cummins*, 14 O. S. 546, 547; *Valley Railway Co. v. Pouchot*, 4 O. C. C. 187; *Branahan v. Hotel Co.*, 39 O. S. 333; *Railway Co. v. Gardner*, 45 O. S. 309.

³ *McComb v. Akron*, 15 O. 475; *Akron v. McCombs*, 18 O. 329; *Crawford v. Delaware*, 7 O. S. 459-469; *Railway v. Cummins*, 14 O. S. 523; *Cincinnati v. Penny*, 21 O. S. 499; *Youngstown v. Moore*, 30 O. S. 183; *Akron v. Chamberlain Co.*, 34 O. S. 328; *Railway Co. v. Lawrence*,

⁴ *Crawford v. Delaware*, 7 O. S. 459.

⁵ Sec. 19, Bill of Rights, Const. Ohio; *Railway v. Cummins*, 14

of a highway in front thereof in three cases. He may recover when an unreasonable grade—a case not liable to arise often—is made in front of his property.¹ Whether he can recover when no improvements whatever have been made upon his lot before an unreasonable grade is constructed in front thereof is a question which does not seem to be settled. A property owner who makes improvements on a lot bounding or abutting upon a street on which there is an established grade, and with reference to such grade, and which grade is afterwards changed to the damage of his property, may recover.² Grading a lot is an improvement of it.³ Again, a property holder who makes improvements on a lot bounding or abutting on a street on which there is no grade established by the municipal authorities, but who anticipates a grade which is afterwards made, and which is subsequently changed to the injury of his property, may recover.⁴ The owner who is sufficiently sagacious to anticipate the grade that a city will establish in front of his property is placed on the same plane in respect to damages as the owner who improves after the grade is established.

Sec. 866. Change of grade — When recovery cannot be had.— Damages for a change of grade cannot be recovered if the improvements are not made with reference to an established grade, if the grade is changed and the last grade is reasonable.⁵ If the public authorities have not fully and completely defined the interest and improvements necessary for the use of the public, the property holder erects his structures and improves his lot at his own risk.⁶ The property must abut on that part of the street on which the change of grade occurs.⁷

O. S. 528; *Street Railway v. Cummins*, 14 O. S. 546, 547.

¹ *Columbus v. Bidlingmier*, 7 O. C. C. 136-139; *Pitton v. Cincinnati*, 8 O. C. C. 598; *Akron v. Chamberlain Co.*, 34 O. S. 328.

² *Railway v. Cummins*, 14 O. S. 528; *Cincinnati v. Penny*, 21 O. S. 499; *Akron v. Chamberlain Co.*, 34 O. S. 328; *Youngstown v. Moore*, 80 O. S. 188; *Cincinnati v. Whetstone*, 47 O. S. 196; *Smith v. Commissioners*, 50 O. S. 628.

³ *Seasongood v. Cincinnati*, 5 O. C. C. 225.

⁴ *Akron v. Chamberlain Co.*, 34 O. S. 328.

⁵ *Akron v. Chamberlain Co.*, 34 O. S. 328.

⁶ *Street Railway v. Cummins*, 14 O. S. 524; *Cincinnati v. Penny*, 21 O. S. 499. But see *Columbus v. Williard*, 7 O. C. C. 118.

⁷ *Whitelead Co. v. Cincinnati*, 1 O. S. C. R. 154; *Jackson v. Jackson*, 16 O. S. 163.

If the petition does not contain an allegation that the plaintiff's property bounds or abuts on the part of the street where the alteration occurs, and that his improvements were made in reference to an established grade which was afterwards changed to the damage of his property, or that in making his improvements he anticipated a grade which was afterwards established and which was subsequently changed to the injury of his premises, or that an unreasonable grade was made in front of his premises on which there were improvements, it is demurrable.

A recovery cannot be had if the proceedings are in strict accordance with law, if the lot-owner does not, within two weeks after the service of notice upon him or the completion of the publication thereof, file a claim in writing with the clerk of the corporation setting forth the amount of damages claimed.¹ It is constitutional to cut off a claimant from damages in this manner,² but the statute must be strictly pursued or the owner of the lot will not be barred.³ A gas company which lays its pipes in a graded street cannot recover the expense of relaying them occasioned by an alteration of the grade.⁴

Sec. 867. Petition for damages for change of grade.—

[Caption.]

The defendant is a municipal corporation duly organized under the laws of the state of Ohio as a city of the — grade of the — class.

The plaintiff is, and has been continuously since the — day of —, 18—, the owner in fee-simple of lot No. —, of — addition to said city, which lot fronts — feet on — street thereof.

That on the — day of —, 18—, the grade of said street in front of said lot was established by an ordinance passed by the council thereof, and thereafter said street was improved and graded in accordance with said ordinance.

That after said street was so improved, to wit, during the year 18—, the plaintiff erected on said lot, at great cost, a

¹ R. S., sec. 2815.

217-228; *Cincinnati v. Corry*, 23 W.

² *Kupp v. Commissioners*, 19 O. S. L. B. 359; *McGee v. Avondale*, 7 O. 173-182; *Reckner v. Warner*, 22 O. S. C. C. 247; *Cohen v. Cleveland*, 48 293; *Anderson v. McKinney*, 24 O. S. O. S. 190; *Harbeck v. Toledo*, 11 O. S. 467-472; *Hickox v. Cleveland*, 8 O. 221.

544-546.

⁴ *Columbus Gas Light & Coke Co.*

³ *Cincinnati v. Sherike*, 47 O. S. v. *Columbus*, 50 O. S. 65.

carriage factory, which was constructed with reference to said grade of said street and entirely conformable thereto.

That during the month of —, 18—, the defendant changed said established grade, and reconstructed said street at a grade much higher than before, and filled and elevated said street in front of said premises about — feet by piling large quantities of earth thereon.

That by reason thereof the access to and from said lot and factory have been greatly impaired, and ingress and egress to said lot and the improvements thereon have been rendered difficult, dangerous and inconvenient, and the value of said property has thereby been diminished in the sum of — dollars.

Upon the — day of —, 18— (at least sixty days before commencing suit), plaintiff filed with the clerk of the defendant his claim in writing hereinbefore set forth for damages, and the defendant has taken no steps whatever to settle or adjust the same.¹

Wherefore plaintiff asks judgment against the defendant in the sum of — dollars, with interest thereon from the — day of —, 18—.

NOTE.— The property holder is entitled to interest on the award from and after the actual change of the established grade. *Cincinnati v. Whetstone*, 47 O. S. 196.

Sec. 868. When corporation may inquire into damages to private property.— There is statutory provision for the municipality taking the initiative to inquire into damages to private property which will obviously result from an improvement, and which are claimed by the property owners.² There is no statute applying to all municipal corporations which requires them to prepare plans and specifications for public improvements before any other steps are taken.³ It is always prudent, and sometimes absolutely necessary,⁴ that they should be prepared before anything else is done. The property holder should have notice of the manner in which the improvement is proposed to be made,⁵ otherwise he cannot be barred from bringing a suit for damages.⁶ Within two weeks after

¹ A petition for damages to property arising from an improvement without this averment is demurrable. *R. S.*, sec. 2326. But this does not apply to a claim for damages for personal injuries. *Warren v. Davis*, 48 O. S. 447.

² *R. S.*, sec. 2315.

³ *Becher v. McCloud*, 4 O. C. C. 305; *R. S.*, sec. 2304.

⁴ *Martin v. Bond Hill*, 7 O. C. C. 271; *Cincinnati v. Corry*, 28 W. L. B. 359.

⁵ *Youngstown v. Moore*, 30 O. S. 133; *Cincinnati v. Corry*, 28 W. L. B. 359.

⁶ *Cincinnati v. Sherike*, 47 O. S. 317.

service of notice of intention to make an improvement,¹ the bounding or abutting property holders must file their claims for damages.² If any are filed, the council determines whether the claims shall be judicially inquired into, and whether this inquiry shall be made before or after the work is done.³ Whether the inquiry is made before or after the work is done, the mayor or city solicitor shall make a written application to the court of common pleas, or a judge thereof in vacation, or to the probate court, for a jury. The proceedings in court are had in accordance with the laws pertaining to the appropriation of private property by municipal corporations.⁴ It is constitutional to postpone the inquiry and payment of damages until after such improvement is made.⁵

Sec. 869. Petition to assess compensation.—

— Court of — County, Ohio.

The City of —, Plaintiff,

vs.

A. B., C. D. and E. F., Defendants.

} Petition.

The plaintiff states that it is a municipal corporation duly organized under the laws of the state of Ohio as a city of the — grade of the — class.

That on the — day of —, 18—, its city council duly adopted a resolution declaring it necessary to improve — street between — street and — street by changing the grade thereof and constructing thereon a stone-block pavement [*or other improvement*] in accordance with the plans and specifications on file in the city civil engineer's office.

That notice in writing of the adoption of said resolution was given to the property owners owning property abutting upon said improvement who were residents of — county [*the county in which the corporation is situated*], and to the other owners of property abutting upon said improvement who are non-residents of said county, by publishing said resolution in the [*name of paper*], a newspaper published and of general circulation in the corporation, for four consecutive weeks.

That the above-named defendants are severally owners of real estate abutting upon said street between the points above named, and, within two weeks after the service of notice of the adoption of said resolution above mentioned, filed in writing with the city clerk claims for damages to their respective

¹ R. S., sec. 2804.

² R. S., sec. 2815.

³ R. S., secs. 2816, 2817.

⁴ R. S., secs. 2817-2821.

⁵ Toledo v. Preston, 50 O. S. 381.

But see Ryan v. Cincinnati, 1 O. C. C. 558.

parcels of real estate in consequence of said proposed improvement.

The defendant A. B. is the owner of lot No. —, of — addition to the city of —, fronting — feet on the — side of said street between the points above named, and he claims that his said real estate will be damaged in the sum of — dollars by said proposed improvement.

The defendant C. D. is the owner of lot No. —, etc.

The defendant E. F. is the owner of lot No. —, etc.

That on the — day of —, 18—, said council of plaintiff duly passed an ordinance whereby it determined that it would proceed with said improvement, and that the claims for damages filed as aforesaid should be judicially inquired into before commencing said proposed improvement.

Wherefore plaintiff prays the court to order that a jury shall be drawn, summoned and impaneled to make inquiry into and assess the damages, if any, which will result to the defendant's property in consequence of the improvement of said street as provided for in said resolution.

City Solicitor of the City of —.

NOTE.—See *ante*, sec. 863.

Sec. 870. Injunctions.— In general, in bringing suits for injunction either against or by a municipal corporation, the proceeding is not different from other cases, and the principles discussed in a former chapter on that subject will apply. But there is a class of injunction cases peculiar to municipal corporations. These are authorized by statute.¹ The city solicitor may bring an action to restrain the misapplication of public funds, the abuse of corporate powers, the execution or performance of an illegal contract made by the corporation, or a contract which is procured by fraud or corruption. In such a suit brought by the solicitor he is not required to give an undertaking.² The suit may be brought either against the corporation, a board or officer thereof,³ or against another person or corporation having a contract with the city which is being violated.⁴ The city solicitor may bring the suit either in his own name or in the name of a tax-payer,⁵ and he has the same powers in respect to bringing such a suit as the corporation itself.

¹ R. S., secs. 1777, 1778.

O. S. 35; *Toledo v. Northwestern Ohio*

² *Forsythe v. Winans, City Solicitor*,
44 O. S. 277.

Natural Gas Co., 5 O. C. C. 557;
Kumler v. Silsbee, 38 O. S. 445.

³ *Walker v. Cincinnati*, 21 O. S. 14.

⁴ *Cincinnati Street R. Co. v. Smith*,

⁵ *Gas Light Co. v. Zanesville*, 47

29 O. S. 291.

If the city solicitor fails to bring the suit on the written request of a tax-payer, the tax-payer may bring the suit himself.¹ A written request to the city solicitor and his declination to bring the suit are conditions precedent to the right of the tax-payer to bring the action,² but not where there is no solicitor.³ The form of the action is peculiar. The solicitor or tax-payer stands in the stead of the corporation. The action should be in the plaintiff's name as a tax-payer on behalf of the corporation, not simply as a tax-payer.⁴ The petition should show that the tax-payer will be put to some expense either by taxation or otherwise.⁵

Sec. 871. Formal parts of petition in actions brought by city solicitor or tax-payer.—

Court of Common Pleas, — County, Ohio.

<p>A. B., as City Solicitor of the City of —, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>C. D., E. F. and E. G., Board of Trustees of the Water- works of the City of —, Defendants.</p>	}	Petition.
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The plaintiff is the duly elected, qualified and acting city solicitor of the city of —, a municipal corporation duly organized under the laws of the state of Ohio as a city of the — grade of the — class.

The defendants are the duly elected, qualified and acting board of water-works trustees of said city.

<p>A. B., a tax-payer, on behalf of the City of —, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>The City of —, C. D., Mayor of the City of —, and E. G., City Clerk of the City of —, Defendants.</p>	}	Petition.
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The plaintiff is a tax-payer of said city of —. On the — day of —, 18—, he requested in writing C. D., the duly

¹ Pease v. Ryan, 7 O. C. C. 44;
Herrick v. Cleveland, 7 O. C. C. 470;

² Findlay Gas Light Co. v. Findlay,
2 O. C. C. 287; Knorr ex rel. v. Mil-
ler, 5 O. C. C. 609.

³ Cope v. Wellsville, 25 W. L. B.
250.

⁴ Hensley v. Hamilton, 8 O. C. C.
201; Dunham v. Opea, Mayor, 8 O.
C. C. 274; Buning on behalf of the
City of Cincinnati v. Cincinnati Street
Ry. Co., 1 O. C. C. 828.

⁵ Buning on behalf of the City of
Cincinnati v. Cincinnati Street Ry.
Co., 1 O. C. C. 323; Simmons v. To-

elected, qualified and acting city solicitor of the defendant, the city of —, to bring this action, which request the said C. D., in writing, declined.

NOTE.—The corporation should be made a party defendant in all cases where the action is brought by a tax-payer, for the reason that he is entitled to a judgment against the corporation for his costs, including an attorney fee, if the court hearing the case is satisfied that such tax-payer had good cause to believe that his allegations were well founded. R. S., sec. 1779.

Sec. 872. Assessments.—The statutes confer upon municipal corporations authority to levy special assessments upon real estate abutting, adjacent or contiguous to public improvements.¹ These assessments are a lien upon the real estate upon which they are levied.² Assessments may be collected by the city or its contractor, to whom they may be assigned in pay for work by suit;³ or they may be certified by the city to the county auditor for collection like other taxes.⁴ The city or its assignee may bring a suit against the property holder on an assessment before a court of competent jurisdiction, or may bring a suit to foreclose the lien.⁵ In such case a part or all of the assessment-payers may be joined as defendants in one suit.⁶

If the law authorizing the assessment is constitutional,⁷ or if a city acquires jurisdiction over the assessment-payer,⁸ or if the proceedings of the city are strictly in conformity to law,⁹ and the assessment does not exceed the restrictions placed by statute upon the corporation,¹⁰ it may be collected. If the suit is brought by a contractor it may be brought in his own name,¹¹ or in the name of the corporation for his use.¹² On the other hand, the suit may be brought by an assessment-payer to restrain the corporation from enforcing the assessment. Each one may bring a separate suit, or part or all of the assessment-payers may join in one suit.¹³

ledo, 5 O. C. C. 194; affirmed by Supreme Court.

¹ R. S., sec. 2264.

² R. S., sec. 2285.

³ R. S., sec. 2303.

⁴ R. S., sec. 2265.

⁵ R. S., sec. 2286.

⁶ R. S., sec. 2287.

⁷ *Parsons v. City of Columbus*, 50 O. S. 460.

⁸ *Welker v. Potter*, 18 O. S. 85.

⁹ *Upington v. Oviatt, Treasurer*, 24 O. S. 288; *Wewill v. Cincinnati*, 45 O. S. 407.

¹⁰ *Diekmeier v. Cincinnati*, 31 O. S. 242.

¹¹ *Hastings v. Columbus*, 42 O. S. 585. But see *Scully v. Ackmeyer*, 2 C. S. C. R. 296.

¹² R. S., sec. 2286.

¹³ *Stone v. Viele*, 38 O. S. 815; *Upington v. Oviatt*, 24 O. S. 288.

Sec. 873. Same continued — Jurisdictional defects.— If the corporation does not acquire jurisdiction over the assessment-payer, the assessment is wholly void. Want of jurisdiction may be pleaded as a defense in an answer to a case brought by the corporation to recover the assessment or to enforce the lien, or it may be set up as a cause of action in a petition by the assessment-payer to restrain the collection of the assessment. There may be want of jurisdiction if the statute under which the assessment is levied is unconstitutional,¹ or if the council fails to adopt a resolution,² or to pass an ordinance, or fail to pass either by the requisite vote, or fail to give notice required by law.³

There is another class of defects in assessments known as technical irregularities; such as the failure to advertise for the requisite time or in the statutory manner,⁴ or where there is fraud in the contract,⁵ or where expenses not properly chargeable in the assessment have been added thereto,⁶ or where the assessment exceeds the amount which may lawfully be levied.⁷ In an action to enjoin the collection of an assessment, jurisdictional and technical irregularities may be pleaded in the same petition. They are not separate causes of action.⁸ They are only different grounds for enjoining the assessment. A technical irregularity does not defeat the whole assessment, but only reduces it to the actual cost, which is a proper charge against the assessment-payer or his property.⁹

Sec. 874. Petition by contractor to foreclose an assessment lien.—

[*Caption.*]

The city of — is a municipal corporation duly organized under the laws of the state of Ohio as a city of the — grade of the — class.

On the — day of —, 18—, the city council of said city duly adopted a resolution declaring it necessary to improve the roadway of — street between — street and — street,

¹ Wright, Treasurer, v. Thomas, 20 O. S. 346.

² Walker v. Potter, 18 O. S. 85; Smith v. Toledo, 24 O. S. 126; Brophy v. Landman, 28 O. S. 543; Stephan, Treasurer, v. Daniels, 27 O. S. 527.

³ R. S., sec. 3304.

⁴ R. S., sec. 2289; Hastings v. Co-

lumbus, 42 O. S. 537; Becher v. McCloud, 4 O. C. C. 305; Upington v. Oviatt, Treasurer, 24 O. S. 233.

⁵ Hubbard v. Norton, 28 O. S. 116.

⁶ Wewill v. Cincinnati, 45 O. S. 407.

⁷ Frey v. Cincinnati, 31 O. S. 242.

⁸ Tyler v. Columbus, 6 O. C. C. 224.

⁹ R. S., sec. 2289.

by grading and constructing thereon a hard-burned brick pavement in accordance with the plans and specifications therefor on file in the office of the city civil engineer.

Said resolution further provided that the cost and expense of said improvement should be levied and assessed upon the property bounding and abutting upon said street between the points above named according to the feet front, and that the contract price thereof should be paid to the contractor by an assessment.

Written notice of the adoption of said resolution was duly served by said city upon the defendant, and said resolution was published for four consecutive weeks in —, a newspaper published and of general circulation in said city.

On the — day of —, 18—, said council of said city duly passed an ordinance to improve said street between the points above named and in the manner provided for in said resolution, which ordinance was afterwards duly published.

The estimated cost of said improvement exceeded five thousand dollars and said city advertised for bids for making said improvement for four weeks in two newspapers published in said city.

The plaintiff was the lowest bidder therefor, and afterwards, on the — day of —, 18—, he entered into a written contract with said city for making said improvement, which contract has been fully completed and the work done thereunder has been accepted by said city.

The total cost of said improvement was — thousand dollars, and on the — day of —, 18—, the said council of said city duly passed and published an ordinance levying the sum of — dollars and — cents upon each foot front of property bounding and abutting upon said improvement, and ordered that said assessment should be paid to plaintiff within twenty days after the passage of said ordinance.

The defendant is the owner of lot No. —, of — addition to the city of —, fronting — feet on said street, between — street and — street, and there was assessed thereon by said ordinance to pay for said improvement the sum of — dollars, no part of which has been paid.

Wherefore plaintiff prays that he may have a decree for — dollars, the amount of said assessment and five per cent. penalty thereon; that said lot may be appraised, advertised and sold, and the proceeds thereof applied to the payment of said assessment, penalty and cost, and for all other proper relief.

Sec. 875. Petition by several parties to enjoin collection of assessment.—

Court of Common Pleas, — County, Ohio.

A. B., C. D. and E. F., Plaintiffs,

vs.

The City of —, —
County Auditor of —
County, and —,
County Treasurer of —
County, Ohio.

} Petition.

The plaintiffs aver that they have a common interest in the subject of this action and in obtaining the relief herein demanded.

The defendant, the city of —, is a corporation duly organized under the laws of the state of Ohio as a city of the — grade of the — class and is situate in — county. The defendant — is the duly elected, qualified and acting county auditor of said — county. The defendant — is the duly elected, qualified and acting county treasurer of said — county.

The plaintiffs are severally the owners of lots bounding and abutting upon — street, between — street and — street.

The plaintiff A. B. is the owner of lot No. — of — addition to the city of —, fronting — feet upon said street.

The plaintiff C. D. is the owner of lot No. — of — addition to the city of —, fronting — feet upon said street.

The plaintiff E. F. is the owner of lot No. — of — addition to the city of —, fronting — feet upon said street.

On the — day of —, 18—, the city council of the defendant, the city of —, adopted a resolution declaring it necessary to improve the roadway of — street from — street to — street by grading and constructing thereon an asphalt pavement in accordance with the plans and specifications therefor on file in the office of the city civil engineer.

Said resolution further provided that the cost and expense of said improvement should be levied and assessed upon the property bounding and abutting upon said street between the points above named according to the feet front.

On the — day of —, 18—, the city council of said defendant, the city of —, passed and published an ordinance to improve said street between the points above named in the manner provided for in said resolution.

Afterwards said city advertised for bids and entered into a written contract with X. Y. as contractor for doing said work. Said X. Y. did work under said contract on said street which was accepted by said defendant, the city of —.

Afterwards said city passed an ordinance levying the sum

of — dollars and — cents upon each front foot of property bounding and abutting upon said improvement, and thereby levied the sum of — dollars and — cents upon each of plaintiffs' said lots, and ordered that said assessment be certified by its clerk to the county auditor to be placed upon the grand duplicate of the county for collection, which was accordingly done, and said assessment has, by said auditor, been placed upon the tax duplicate of said county, which is now in the hands of — —, treasurer of said county, and who is demanding payment of said assessment from these plaintiffs.

The said ordinance levying said assessment upon plaintiffs' said lots and the proceedings of said city providing for said improvement are irregular, illegal and void, and of no effect for the purpose of charging said assessment, or any part thereof, upon said lots of plaintiffs, for the following reasons:

I. Said improvement was made under and by virtue of a pretended act of the general assembly of the state of Ohio, entitled "An act to provide for the improvement of streets and alleys in cities of the — grade of the — class." Passed — —, 18—. Said act is unconstitutional and void for the reason that it is a special act, applying only to the city of —, and confers corporate powers, and is therefore in conflict with and repugnant to section 1, article XIII, of the constitution of the state of Ohio. [*Other constitutional objections.*]

II. At the time of the adoption of said pretended resolution declaring it necessary to improve said street the city council of the defendant, the city of —, consisted of eighteen members. On the question of the adoption of said resolution ten of said members voted in the affirmative and eight in the negative. Notwithstanding said resolution did not receive the necessary two-thirds vote in the affirmative, as required by law, the presiding officer of said council declared said resolution adopted.

III. The defendant, the city of —, did not serve written notice upon plaintiffs, or either of them, of the adoption of said pretended resolution, nor any other resolution, notwithstanding they were, at the time of the pretended adoption of said pretended resolution, and continuously ever since have been, residents of said — county. [*Aver any other jurisdictional defects.*]

But if it shall be found by the court that the foregoing objections to said assessment are not true and said assessment is not thereby rendered void, then the plaintiffs aver that there should be a substantial reduction in said assessment for the following reasons:

IV. The plans and specifications for and the contract between the defendant, the city of —, and X. Y., provided that said improvement should consist of a crushed-stone

foundation twelve inches deep covered with a mastic of Trinidad asphalt two and one-half inches deep. Plaintiffs aver that said work was not done in accordance with said contract for the reason that the foundation was constructed of crushed stone only eight inches and the mastic is only one and one-half inches deep.

V. Plaintiffs aver that the estimated and actual cost of said improvement exceeded five thousand dollars, but that the defendant, the city of —, did not advertise for bids therefor in two newspapers published in said corporation for four consecutive weeks, but only advertised for the period of twenty-five days. [*Aver other irregularities.*]

Wherefore plaintiffs pray that upon the filing of this petition a temporary restraining order may issue restraining —, county treasurer, from collecting or attempting to collect said assessment or any portion thereof levied upon the plaintiffs' said lots; that upon final hearing of this cause said assessment may be adjudged null and void, and that the defendants and each of them may be enjoined from collecting or attempting to collect the same, and for all other proper relief.

Sec. 876. Contracts — Pleading of.— When actions are brought upon contracts to which a municipal corporation is a party, the only averments which are different from those of contracts generally are the allegations which show that the corporation took the legal steps to make a valid contract. If, as a condition precedent to making a valid contract, it was necessary to adopt a resolution and pass an ordinance, it is necessary to plead these facts, otherwise it would not appear whether the corporation took the necessary steps. A statute provides that no contract providing for the expenditure of money shall be entered into by a municipal corporation until the city clerk or auditor has certified that the money required to meet the contract is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose.¹ The failure to comply with this statute, when set up in an answer by the corporation, is a good defense.² A failure to comply with this statutory provision does not render a city liable for negligence where it would not otherwise be liable.³

¹ R. S., sec. 2702.

² Bond v. Madisonville, 2 O. C. C. 449; Rhodes v. Toledo, 6 O. C. C. 9;

Ryan v. Hoffman, 26 O. S. 109; Setter v. Hoffman, 25 O. S. 328.

³ Elster v. Springfield, 49 O. S. 82-84.

Sec. 877. Condemnation proceedings — Application to assess compensation.—

[*Caption.*]

The city of C., Ohio, plaintiff, a municipal corporation duly organized under the laws of the state of Ohio as a city, says that it is a city of the — grade of the — class; that it has a city council duly elected, qualified and acting as such; that its said council, by an ordinance passed on the — day of —, 18—, the yeas and nays being taken thereon and entered on the records of the proceedings of said council, and two-thirds of all the members elected to said council concurring therein, declared it was deemed necessary to condemn and appropriate to public use for the purpose of opening — street, and declaring its intention so to do, did condemn and appropriate to the public use for said purpose the following described property, to wit: [*Description.*]

The plaintiff further says that the defendants herein own or claim to own, or have some interest in or title to, said property.

Wherefore the plaintiff asks the court here to cause a jury to be impaneled to inquire and assess the compensation to be paid by said city of C., Ohio, for said property for said purpose; and that upon payment into court, or to the proper owners of said property, of the compensation so assessed for said property, the appropriation of said property to said use and for said purpose may be allowed, and possession given according to law.

City Solicitor of C., Ohio.

CHAPTER 68.

NEGLIGENCE CAUSING DEATH.

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| <p>Sec. 878. Action for wrongful death — Purely a statutory remedy.</p> <p>879. By whom and for whose benefit it may be brought.</p> <p>880. Same continued — Rules of pleading applicable.</p> <p>881. Same continued — Averment of damages.</p> <p>882. Petition against railroad company for negligence in starting train — Causing death.</p> <p>883. Petition for death caused by locomotive running over decedent while walking along street and across track in the night.</p> <p>884. Petition for death of brakeman arising from defective brakes.</p> <p>885. Petition by section-hand against railroad company, injured while fastening rails together, by approaching train.</p> <p>886. Petition for death of passenger caused by car leaving track.</p> <p>887. Petition for injury to brakeman caused by open switch and failure to place lights or watchmen.</p> | <p>Sec. 888. Petition for death of brakeman caused by backing cars while engaged in detaching cars.</p> <p>889. Petition for death of passenger caused by falling from train through failure to place light on rear car platform, being run over by another train.</p> <p>890. Petition for death caused by train running into vehicle at crossing.</p> <p>891. Petition for death of employee (car inspector) caused by switch being left open.</p> <p>892. Petition against railroad company for death caused by drowning from steam railway ferry-boat.</p> <p>893. Petition against druggist for negligent sale of poison causing death.</p> <p>894. Answer by railroad company that open switch causing injury to brakeman was opened by person unknown, and that plaintiff contributed to injury by not being in his proper place.</p> <p>895. General denial by railroad company.</p> |
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Sec. 878. Action for wrongful death — Purely a statutory remedy.— No action could be sustained at common law for an injury resulting in death until after the passage of the Lord

Campbell Act.¹ The first American statute authorizing the action was enacted in New York in 1849;² and before the passage of an act authorizing it,³ an action for pecuniary loss resulting from death was unknown in Ohio. Such an action can be sustained only in cases clearly falling within its provisions. For example, death resulting from intoxication,⁴ or cases where the wrongful act causing death was committed outside of the state, do not come within the purview of the statute.⁵ It is provided that whenever the death of a person is caused by the wrongful act, neglect or default of another, which was such that the injured party himself could, if death had not ensued, have maintained an action for damages, the person or corporation causing the death is liable to an action for damages.⁶ This has been held to embrace cases where death is caused by the wrongful act of another in the negligent sale of poisonous drugs resulting in death.⁷

Sec. 879. By whom and for whose benefit it may be brought.—The action is designed for the exclusive benefit of the wife, husband, child or next of kin, and must be prosecuted in the name of the personal representative.⁸ It cannot be brought in the name of a widow or next of kin.⁹ The right to sue, being purely statutory and in derogation of the common law, must be strictly construed.¹⁰ It is extended only to the personal representative, though the damages must inure to the benefit of the widow, children or next of kin, and the action cannot be sustained if there are none. The question, therefore, whether or not there are persons who come within the provisions of the statute, and entitled to the damages resulting from the death complained of, is an issuable, traversable fact;¹¹

¹ 9 & 10 Vict., ch. 93, p. 603.

² Ch. 450.

³ 49 O. L. 117.

⁴ *Davis v. Justice*, 81 O. S. 359.

⁵ *Hover v. Railroad Co.*, 25 O. S. 667; *Campbell v. Rogers*, 2 Handy, 110; *Van Camp v. Aldrich*, 2 Am. Law Rec. 454. But it is not necessary to aver that the action occurred within the state. *Lawton v. Maratti*, 2 C. S. C. R. 82.

⁶ R. S., sec. 6184.

⁷ *Davis v. Guarnieri*, 45 O. S. 471.

⁸ R. S., sec. 6135.

⁹ *Widner v. Rankin*, 26 O. S. 522.

¹⁰ *Geroux v. Graves*, 62 Vt. 280-84;

Railroad Co. v. Swayne, 26 Ind. 477.

¹¹ *Railway Co. v. Swayne*, *supra*;

Railway Co. v. Hendricks, 41 Ind. 48;

Railroad Co. v. Keeley, 23 Ind. 138;

Warren v. Englehart, 13 Neb. 283;

Stewart v. Railroad Co., 103 Ind. 46;

Woodward v. Railroad Co., 28 Wis. 400.

for if there are no persons falling within the statute, no action can be sustained, and it is therefore essential that the names of the persons for whose benefit the suit is brought be stated in the petition,¹ although it is not considered fatal if some of the persons mentioned therein are not next of kin;² nor is it essential that the ages and residence, or the extent of their dependence upon the deceased, be stated.³

It has been held in Vermont that an action may be maintained under a statute by an administrator for the benefit of the estate, where the decedent lived a short time after the injury;⁴ and the action has been sustained in Wisconsin by a mother as administratrix, who alleged that she was dependent upon the intestate in a large degree for support.⁵ A husband is held to be within the meaning of the act, as next of kin, and may therefore maintain the action for the wrongful death of his wife.⁶ An action has also been sustained by an administrator of a woman for the benefit of her illegitimate child,⁷ and for the benefit of the next of kin, though the decedent leave no widow or children.⁸ The damages recovered cannot be used for the general benefit of the estate, but must go to the persons entitled to them under the statute.⁹

Sec. 880. Same continued—Rules of pleading applicable.—Some of the general principles of negligence and rules of pleading governing other actions for negligence, such as for personal injuries and actions between master and servant, apply with equal force to an action for death caused by wrongful act. The principal point of difference in respect to questions of pleading between those actions for personal injuries, and between master and servant, and for wrongful

¹ Hall v. Crain, 2 W. L. M. 593; Quincy Coal Co. v. Hood, 77 Ill. 72; Chicago R. R. Co. v. Morris, 26 Ill. 400; Stewart v. Railroad Co., 103 Ind. 44; Hartzell v. Shannon, 6 W. L. B. 756.

² Clore v. McIntire, 120 Ind. 262; Woodward v. Railroad Co., 23 Wis. 400; Commonwealth v. Railroad Co., 11 Cush. 517; Lamphear v. Buckingham, 33 Conn. 337; Westcott v. Railroad Co., 61 Vt. 486.

³ Westcott v. Railroad Co., *supra*.

⁴ Geroux v. Graves, 62 Vt. 260.

⁵ Wiltse v. Tilden, 77 Wis. 152.

⁶ Steel v. Kurtz, 28 O. S. 191. *Contra*, Warren v. Englehart, 18 Neb. 283. See 1 Handy, 481.

⁷ Muhl v. Railroad Co., 10 O. S. 272.

⁸ Davis v. Railroad Co., 7 O. S. 336.

⁹ Hall v. Crain, 2 W. L. M. 593.

death, consists in the rules for stating the beneficiaries under the statute,¹ and in the averment of damages recoverable.² This arises by reason of the statute applicable to this particular action. But so far as the principles of pleading the negligence of a defendant,³ or contributory negligence of the person injured, or the rules of law governing the relation of master and servant,⁴ or of other persons not sustaining that relation, are concerned, they must of necessity be the same in all cases. The reader, therefore, is referred to particular chapters in which are treated the special questions.⁵ It may here be observed, however, that where a petition sets out every fact necessary to bring the case within the statute, the statute itself need not be referred to in express terms.⁶ In an action for death caused by wrongful act, all the facts and circumstances connected with the negligence causing death which are essential to support the action should be alleged or in substance appear on the face of the petition.⁷ An action may be sustained against a county for the death of a traveler caused by the falling of a bridge built of defective materials,⁸ or against a receiver of a railroad;⁹ or against a municipal corporation for negligently and wrongfully causing the death of a person.¹⁰

Sec. 881. Same continued — Averment of damages.— The provisions of the various codes¹¹ are not dissimilar in language, and in substance provide that the damages recoverable in an action for the wrongful death of a person are measured by the pecuniary loss resulting to the beneficiaries after death.¹² To have a perfect knowledge of how to plead the damages sustained, it is essential that a correct understanding be had of the term "pecuniary damages," or loss resulting to the beneficiaries, and to know what elements it includes. There is conflict of opinion upon this question and a consequent diversity of plead-

¹ *Ante*, secs. 879-85.

² See *post*, sec. 881.

³ Sec. 916, *post*.

⁴ See ch. 64.

⁵ For general questions of negligence, see ch. 65.

⁶ *Westcott v. Railroad Co.*, 61 Vt. 438; 47 Atl. Rep. 745; *Morrissey v. Hughes*, 21 Atl. Rep. 205 (Vt., 1893).

⁷ See *post*, sec. 916.

⁸ *Commissioners v. Creviston*, 133 Ind. 39; 32 N. E. Rep. 735.

⁹ *Murphy v. Holbrook*, 20 O. S. 187.

¹⁰ *Boyd v. Cambridge*, 4 O. C. C. 518.

¹¹ *Tiffany's Death by Wrongful Act*, sec. 153, and Appendix.

¹² Ohio Code, secs. 6184-85; N. Y. R. S., sec. 1904; Mich. R. S., sec. 8492.

ing. The primary purpose of the statute evidently was to exclude such injuries as affect the sentiments, affections or feelings of the beneficiaries.¹ The life of the person must be considered as purely a matter of merchandise, and the damages must be measured by the ability of the decedent to earn money and to acquire property for the enjoyment of those who may be benefited by the recovery. This view will necessarily include prospective damages, based upon the theory that if life had been continued the deceased would have continued to prosper and to have acquired money.² Some authorities maintain the doctrine that actual pecuniary loss must be averred before it can be proven on trial,³ and that to warrant the recovery of special damages, such as for loss of prospective earnings, the same must be specially pleaded.⁴ The doctrine is adopted in Ohio that to require beneficiaries to make proof of actual and direct injury would be to deny the rights conferred by statute, and therefore permit them to show what they might have received from the decedent had he lived.⁵ This is consonant with the rule that it is sufficient to plead the damages sustained in general terms. It has been held, however, that under a general allegation nominal damages may be recovered, and that special circumstances can only affect the amount.⁶

The practice pursued in Ohio in this class of actions is to allege damages in general terms; and it is unquestionably the better doctrine that a general allegation of damages in such cases is sufficient to permit the introduction of proof of all damages sustained by the beneficiaries, such as prospective earnings and all damages usually recovered in such actions. It is said that to require the plaintiff to go further would be to compel him to plead evidence.⁷ The measure of damages in such cases must necessarily be prospective. There is an exception to the foregoing rule where it is sought to recover damages for an injury to business, in which case it has been considered essential that the same be specially pleaded.⁸ The petition should also show that the damages have been sustained by some particular person.⁹ Evidence that the husband has remarried is not admissible in mitigation of damages.¹⁰

¹ *Steel v. Kurtz*, 28 O. S. 191; *Blake v. Railway Co.*, 10 Eng. L. & E. 437; *Hall v. Crain*, 3 W. L. M. 593.

² *Tilley v. Railroad Co.*, 29 N. Y. 252-64; *Hall v. Crain*, 3 W. L. M. 137; *Groff v. Railroad Co.*, 1 C. S. C. R. 264.

³ *Railroad Co. v. Morris*, 26 Ill. 400; *Safford v. Drew*, 3 Duer, 627; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Woodward v. Railway Co.*, 23 Wis. 400; *Kelly v. Railway Co.*, 50 Wis. 383.

⁴ *Hurst v. Street Railway Co.*, 84 Mich. 546; *Penn. Co. v. Lilley*, 73 Ind. 254; *Gilligan v. Railroad Co.*, 1 E. D. Smith, 453; *Tomlinson v. Derby*, 43 Conn. 562; *Mathews v.*

Railway Co., 26 Mo. App. 284; *Perry v. Banking Co.*, 85 Ga. 193; s. c., 11 S. E. Rep. 605.

⁵ *Grotenkemper v. Harris*, 25 O. S. 510, 514; *Barren Case*, 5 Wall. 93; *Hall v. Crain*, 3 W. L. M. 137; *Groff v. Railroad Co.*, 1 C. S. C. R. 264.

⁶ *Johnson v. Railroad Co.*, 7 O. S. 336; *Railroad Co. v. Shannon*, 43 Ill. 338; *Oldfield v. Railroad Co.*, 14 N. Y. 310; *Quin v. Moore*, 15 N. Y. 438.

⁷ *Barnum v. Railway Co.*, 30 Minn. 461.

⁸ *McClardy v. Chandler*, 2 W. L. G. 1.

⁹ *Dunhene v. Trust Co.*, 1 Disn. 257.

¹⁰ *Davis v. Guarnieri*, 45 O. S. 470.

Sec. 880a. Contributory negligence of beneficiaries.

—In actions in the name of an administrator to recover damages resulting from the death of the intestate, the administrator is merely a nominal party, the beneficiaries for whom he seeks recovery being the real parties in interest.

The test in the first instance as to whether this action can be maintained, is whether the deceased was guilty of contributory negligence. If he was not, then his administrator may maintain an action for his death if negligently caused. In such actions contributory negligence is available as a defense against such beneficiaries, as their negligence—contributory negligence—contributed to the death of the deceased; but the contributory negligence of some of the beneficiaries will not defeat the action as to others, who were not guilty of such negligence.¹

Sec. 882. Petition against railroad company for negligence in starting train—Causing death.—

Plaintiff was by the probate court of — county, Ohio, on the — day of —, 18—, duly appointed administrator of the estate of C. D., who died —, 18—, and is the duly qualified and acting administrator of said estate.

That defendant is a corporation duly organized under the laws of the state of Ohio, and a common carrier of passengers for hire from — to —.

That on or about — —, 18—, one C. D., of S., became a passenger in one of defendant's passenger-trains, having duly paid his fare as such according to defendant's regulations and requirements, and was carried from — to — on defendant's road.

That upon the arrival of said train at defendant's station at P. aforesaid, and while said C. D., after having been invited by defendant to alight from said train, was attempting so to do, defendant negligently and violently started its train, whereby said C. D. was thrown from his footing [without fault or negligence of the decedent], and so bruised and injured that he shortly after died of such injuries on the — day of —, 18—.

That it was defendant's duty, upon the arrival of its said train at such station, to bring the same to a full stop, and keep it standing a sufficient length of time to afford C. D. an opportunity to alight therefrom with safety, but that defendant neglected his duty in this regard and did not give said C. D. an opportunity to alight, and the death of said C. D. was caused by the defendant's said negligence.

That said C. D. left B., his widow, and the following named children [*names and ages*], his only next of kin, who were

¹ Wolf v. L. E. & W. Ry. Co., 55 O. S. 517; Davis v. Gaurnieri, 45 O. S. 470; Railroad Co. v. Snyder, 24 O. S. 67.

wholly dependent upon him for support, and said widow and next of kin have been damaged by the death of the said C. D. in the sum of — dollars, for which plaintiff asks judgment.

NOTE.—The sudden jerking of a train while passengers are rightfully passing out of cars is negligence. *Santer v. Railroad Co.*, 66 N. Y. 50.

Sec. 883. Petition for death caused by locomotive running over decedent while walking along street and across track in the night.—

[*Caption and averment of representative capacity as in ante, sec. 882.*]

The plaintiff further avers that the defendant, the C. & T. R. Co., is a body corporate, duly incorporated under and in pursuance of the laws of the state of Ohio.

Plaintiff, as said administrator, says:

That at the time of the commission of the grievances hereinafter mentioned defendant was, and still is, the owner and operator of a line of railroad leading from the city of C., in the county of —, in the state of Ohio, through the village of F., in the county of —, in the state of Ohio, and across F. street, in the said village of F., to the city of T., in the county of —, in the state of Ohio.

That in the night-time of the — day of —, 18—, the said P. O., deceased, then in full life, was walking on and along the said F. street, in the said village of F., at a point where the said street is crossed by the said railroad so owned and operated by the defendant, when [without his fault or neglect] the defendant, by its servants in the charge and control of a locomotive engine and cars attached thereto, of the defendant, then on the said railroad, near to the point aforesaid, so negligently, carelessly and unskilfully moved said engine and cars on and along the said railroad tracks and in the direction of the point aforesaid, that the said engine and cars were, by the negligent, careless and unskilful acts of the said servants, in the management of said engine and cars, run against and over the said P. O., deceased, who was by the said negligence, carelessness and unskilfulness of the said servants aforesaid, then and there, thereby instantly killed.

The plaintiff avers that the said P. O., deceased, at his decease left S. O., his widow, and D. O. and S. O., his children and only heirs at law.

The plaintiff states that by reason of that which is hereinbefore stated she has sustained damages in the sum of — dollars.

Wherefore the plaintiff prays judgment against the defendant in the sum of — dollars.

G. E. S., Plaintiff's Attorney.

NOTE.—From *The Columbus & Toledo Ry. Co. v. O'Brien*, Supreme Court, unreported, No. 2323. A person should use the faculties of hearing and see-

ing before passing over a railroad crossing. *Pennsylvania Co. v. Rathgeb*, 83 O. S. 86. And to ascertain if there is a train in the vicinity. *Railway Co. v. Elliott*, 28 O. S. 341; *Railway Co. v. Snyder*, 24 O. S. 670. Omission to ring bell or sound whistle is not of itself a sufficient ground for recovery. 28 O. S. 341.

Sec. 884. Petition for death of brakeman arising from defective brakes.—

[Averment of representative and corporate capacity as in ante, sec. 882.]

Plaintiff's decedent was on the — day of —, 18—, in the employ of said defendant company in the capacity of brakeman, and on said date was at his accustomed work upon a certain car of said company used for *[state purpose]*.

It was the duty of the defendant company to have carefully constructed, inspected and operated said car and the machinery and appliances necessary to the running thereof, but that said defendant neglected its duty in this respect and wholly failed and neglected to so properly construct, inspect and operate its said car; that the defects in the construction, inspection and use of said car and its appliances and machinery were latent and hidden, and said E. F., while so employed as brakeman, had no notice thereof whatever.

That said E. F., while in the performance of his duty as such brakeman, in obedience to a signal from the engineer to apply the brakes upon said car, and without any fault or negligence on his part, and while in the proper and lawful performance of his duty as such brakeman in applying the brake on said car to check the speed of the train and stop the same, the brake, machinery and appliances on said car broke, gave away and fell apart, and the said E. F., in consequence of the breaking of the same, was then and there, without the fault or neglect of plaintiff, with great force and violence thrown to the ground and dragged under said car, by reason of which he was bruised and wounded, and on the — day of —, 18—, died from said injuries.

That the estate of said E. F. has sustained damages in the sum of \$—.

[Prayer.]

Sec. 885. Petition by section-hand against railroad company injured while fastening rails together, by approaching train.

[Caption.]

[Formal averments as to representative capacity.]

That defendant is a railway corporation organized and operating, under the laws of Ohio, a railroad running through said county of —, and state of Ohio, and also through the counties of — in said state.

That on the — day of —, 18—, and for some days previous to said date, the said A. M., then in full life, was in the

employment of the defendant as a workman and repairer upon the railroad track, commonly called a section-hand, and was on the — day of —, 18—, at work in repairing defendant's said track on the main line and near the station of M., Ohio, and as said section-hand was with others likewise employed under the direction and control of a section boss, so called. That it was the duty of said A. M. to work where, and in the manner, directed by said section boss, and it was the duty of said section boss to oversee the work done by the section-men, and it was the duty of defendant to make proper and reasonable provision for the safety of said M. while in the performance of his duties as a track repairer, and also to require of its engineers in charge of locomotives and trains to be watchful for persons on its track, and to signal them when approaching the place of their work.

That on above-named date said M., in the performance of his duties, and as directed by the said section boss, was engaged in fastening two rails together upon the main track of defendant's road, and in order to perform said work it was necessary for him to be upon the track, and in a stooping position, and in such situation he could not keep watch for approaching trains from both directions along said railroad; and defendant negligently failed and neglected to provide any person to watch for such trains; negligently failed to require any warning to be given of the approach of trains, and negligently failed to otherwise protect said M. from danger while so working on said track; and in consequence of said negligence of the defendant aforesaid, and while said M. was stooping over, engaged in his said work, and without any fault or negligence on his part, said A. M. was struck by an east-bound locomotive drawing a freight train, without warning or signal, and was then and there, in consequence of said negligent acts of the defendant, so injured in the body and head that in consequence thereof he, on said — day of —, 18—, died.

That said A. M. left a widow, M. M., and a daughter, M. M., aged — years, dependent upon him for support, and also left as his other children and heirs the following: [*Insert names.*]

That in consequence of the facts hereinbefore stated, the widow and heirs of decedent have been damaged in the sum of — dollars, for which plaintiff asks judgment.

C. & K.,

Attorneys for Plaintiff.

NOTE—From *L. S. & M. S. Ry. v. Murphy*, 29 W. L. B. 163; 50 O. S. 136, which approved the petition, holding that it stated a case. It is the duty of a railway company to afford reasonable protection to its employees against dangers incident to their work. *Id.*; *Railway Co. v. Lavelley*, 36 O. S. 221.

Contributory negligence, when doubtful and of such character that different minds might differ as to the inference to be drawn, cannot be determined by the court as matter of law, but is for the jury. *Railway Co. v. Murphy*, 50 O. S. 136, 137.

Sec. 886. Petition for death of passenger caused by car leaving track.—

[Caption and averment of representative capacity.]

That on the — day of —, 18—, the defendant was operating a railroad from — to —, and was a common carrier of passengers and freight for hire on said railroad.

That on said day, said defendant railway company in consideration of the sum of \$—, paid by the said A. B., deceased, to said company as fare for his passage, undertook to safely carry said A. B. as a passenger on said railroad from — to —, a station on said line. That by the negligence of the defendant in the management of its said train the car in which the said A. B., deceased, was riding as a passenger was thrown from the track, and the said A. B. was thereby killed.

That said A. B. left one E. B., his widow, surviving him, and C. B., a child of — years of age, and D. B., a child of — years, then being the next of kin of said A. B., who have sustained damages by his death in the sum of \$—, for which plaintiff asks judgment.

Sec. 887. Petition for death of brakeman caused by open switch and failure to place lights or watchman.—

That said defendant, at the time of the commission of the wrongs herein complained of, was a corporation duly organized under the laws of the state of Ohio and was duly authorized to operate and was operating various public railroads of said state, as common carriers therein.

That a part of the line of said defendant's railway extended through the township of —, in — county, Ohio; that in said township, and just north of what is known as W., is a ravine, through which flows a small stream of water called "C.," and that said ravine and creek was spanned by a trestle and bridge belonging to said railroad company and was part of said railroad line, and that about eight feet south of the south end of said trestle was a switch, and side-track extending southward from said switch, which were used by said company in operating said railroad; that said switch was used by said defendant in the usual manner in switching its trains off and on said railroad to and from said side-track. There were at said time five or more other switches near to and south of said switch and belonging to and operated by said defendant as part of their said railroad line.

That a few days prior to the — day of —, 18—, on several different occasions and in the night-time, one or more of said switches had been opened by some one or in some way unknown to plaintiff, but so as to derail the railroad trains running on and over said part of said railroad. That the condition of said switch or switches was seen by the persons employed to operate the trains over the same in time to stop

the train and thus avert disaster. That by reason thereof and through the negligence of said defendant to place at said switches the ordinary switch light to indicate the condition thereof, said defendant company ran its trains over and upon said part of its road at a high rate of speed, and said place had become dangerous to said defendant's trains running thereon. That in order to make it safe for its trains to pass said dangerous place said defendant employed watchmen to guard said switches, but retained them in said employment but a few days and then discharged them. That on the — day of —, 18—, and but a few days after the discharge of said watchmen, at about — o'clock in the night-time, a freight train belonging to and operated by said defendant approached said switch from the south, near said bridge and trestle, at a high rate of speed; that at said time, by reason of the carelessness and negligence of the defendant in not having securely fastened the same and in not having provided watchmen upon that night, as it had before done, it was open; that by reason of the darkness of the night and the want of the ordinary switch light, said open switch could not be seen by those operating the train until too late to save said train; that said W. E. T. was then employed by said defendant on said approaching freight train as first brakeman and was in the discharge of his duty as such brakeman on said train, and was acting with prudence and care; that by reason of the carelessness and negligence of the defendant in not continuing watchmen on said night at said dangerous place, and in not placing a light at said switch, and in not having securely fastened the same, and in running said train at a high rate of speed over said dangerous place, said train was derailed by the open switch, thrown forward and over the bank spanned by said bridge and trestle, and by reason thereof said W. E. T. was killed.

Plaintiff further says that W. E. T. left a widow, E. E. T., and two children, aged respectively three years and six months, who were dependent upon him solely for their support and maintenance; that at the time of his death and for a long time prior thereto he was earning and receiving from said railroad company as brakeman in their employ — dollars and more per month, and that this money was used by him in the support of his said family; that he left no property, and his said widow and children were by said wrongful acts and negligence of said company left wholly dependent upon others, and have been damaged in the premises in the sum of — dollars, for which sum, with interest from —, plaintiff as such administrator asks judgment and his costs.

J. F. W. and C. A. H.,

Plaintiff's Attorneys.

NOTE.—From N. Y. P. & O. R. R. Co. v. Tidd, Supreme Court, unreported, No. 2507.

Sec. 888. Petition for death of brakeman caused by backing cars on him while engaged in detaching cars.—

[*Formal averments of representative capacity, ante, sec. 882.*]

That the said D. A. B. was in the service of the said defendant as a brakeman on one of the trains of cars of said defendant, running from T., Ohio, to M., Ohio, on the — day of —, 18—, and that as the said train was at or near the T., Ohio, station, where it was to and did stop, and the said D. A. B., in obedience to the orders of the conductor of said train for that purpose given, was engaged in detaching and separating the cars of said train, and while so employed, the locomotive with a portion of the cars of said train moved forward, leaving on the track a car that had become detached; that the said D. A. B. placed his lantern with a light therein by the side of the track of said road and was engaged in the discharge of his duty at the end of said detached freight-car on the line of said road, and whilst in that position and so engaged the conductor of said train wrongfully, carelessly and negligently ordered and directed the engineer of said train to move the engine and cars attached thereto back toward and in the direction of the freight-car where the said D. A. B. was then engaged in the discharge of his duty, and that (in so moving the said engine and cars attached thereto, back and against the freight-car where the said D. A. B. was at work as aforesaid) the said D. A. B. was then and there, without any negligence or fault on his part, run against and caught between the dead-heads and other parts of said cars, and was bruised, crushed and mangled under and between the cars of said freight train and so injured thereby that he instantly died therefrom; and the said plaintiff avers that the death of said D. A. B. was so caused by the neglect and carelessness of the said defendant through and by means of the wrongful acts and negligence aforesaid. [*Usual averments as to heirs surviving, etc.*]

The said plaintiff therefore prays a judgment against the said defendant for the said sum of — dollars, his damages as aforesaid.

T. Y. M. and G. & G.,

Attorneys for Plaintiff.

NOTE.—From *Pennsylvania Co. v. Mason*, Supreme Court, unreported, No. 2282.

Sec. 889. Petition for death of passenger caused by falling from train through failure to place light on car platform, being run over by another train.—

[*Caption and averment of representative capacity.*]

That the defendant is, and was at the time hereinafter mentioned, a corporation duly incorporated under the laws of the state of Ohio, and owned and operated a railroad known as

the C. H. & D. R. R., and were common carriers of passengers for hire.

That on or about the — day of —, 18—, the said J. J. K., then living, was a passenger on said railroad, from M. to H., Ohio, in the night-time, he having paid his fare therefor; that while the car in which he was a passenger was in motion, he opened the rear door and stepped upon the platform thereof, but that by reason of the negligence of the defendant and its servants there was no light upon the said platform, nor was there any barrier or guard there placed to prevent passengers falling from said platform, so that without any fault on his part he fell upon the track of the said railroad, and was greatly and permanently injured thereby, and he was unable by his own exertion to move from the said track.

That the agents of the defendant in charge of the said train were at once notified of the falling of the said K. from the train, but they failed and refused to stop the train or to care for the fallen passenger, but permitted him to remain on the track where he had fallen.

That within an hour or two after the said K. had fallen upon the said track, and while he yet remained there injured as aforesaid, another train, owned and controlled by the said defendant, passed over the said road at this place where the said K. was lying, and notwithstanding the notice which defendant had received, and by reason of the negligence of the defendant and its agents, the said train ran over the said K., and he was thereby killed.

Plaintiff further says that said J. J. K. left his mother, T. K., who was dependent on him for support, and B. K., aged — years, C. K., aged — years, and C. M., aged — years, his brothers and sisters, and next of kin, who were injured by the death of the said J. J. K. to the amount of \$—.

Wherefore plaintiff, as such administrator, asks judgment against the defendant in the sum of \$— and costs.

B. & C., Attorneys for Plaintiff.

NOTE—From *Railroad Co. v. Kassen*, 49 O. S. 280. Plaintiff may recover, even though his own negligence exposed him to the injury, if the defendant, after having notice, failed to use ordinary care to prevent the injury. *Id.* Where passenger steps or falls from a train and is injured by another train, the latter is the proximate cause. *Id.*; 8 O. S. 172. To pass from one car to another while train is in motion is negligence. *C. C. & I. R. R. v. Manson*, 80 O. S. 451. See *Commonwealth v. B. & M. R. R.*, 129 Mass. 500.

Sec. 890. Petition for death caused by train running into vehicle at crossing.—

[*Caption and averment of appointment of administrator.*]

That the P. Company, operating the P., Ft. W. & C. Railway, is a foreign corporation, operating a railway commencing at the city of P., state of P., and passing through said

county of —, and terminating at the city of C., in the state of I.

That the defendants on the — day of —, 18—, by their servants, so negligently and unskillfully drove and managed an engine and a train of cars attached thereto, upon and along said railway, which the said T. J. B. was then lawfully crossing at what is commonly known as the M. P. crossing, near the house of said M. P., where the state road from L., in — county, Ohio, to W., in — county, Ohio, crosses said railway in W. township, in said county, with two horses attached to a wagon, that the said engine and train of cars were driven and struck against said horses and wagon, whereby the said T. J. B. was thrown from said wagon and killed, without any fault or negligence on the part of the said T. J. B., or the said plaintiff.

The said T. J. B. at the time of his death had neither wife or children, but left G. S. B. and M. S. B., his parents, and J. H. B., M. C. B., his brothers and sisters, who have sustained damages in the sum of — dollars, for which plaintiff prays judgment.

C. & H.,

Attorneys for Plaintiff.

NOTE.—From *Pennsylvania Co. v. Bender*, Supreme Court, unreported, No. 1911.

Contributory negligence.—A person in a vehicle is guilty of contributory negligence in attempting to cross railroad tracks without looking for approaching trains, if by so doing he could have seen such train, even though the company had kept a flagman, but who was not there at the time of injury. *Railway Co. v. Geiger*, 8 O. C. C. 41. See *Railroad Co. v. Crawford*, 24 O. S. 640.

Sec. 891. Petition for death of employee (car inspector) caused by switch being open.—

[*Caption and averment of representative capacity, ante, sec. 882.*]

That on the — day of —, 18—, the said T. B., deceased, was in the employment of the C. & A. R. Co., in the capacity of repairer and car inspector, at M., Ohio, and was thus and there in said employment with the lessee of said company, in the discharge of his duty in inspecting a car standing upon the transfer, or what is called a "Y," which connects the C. & A. Railroad with the C., H. V. & T. Railroad at the junction of said railroads, on the west side of the C., H. V. & T. Railroad, and north of the C. & A. Railroad, just outside of the village of M., in M. county, Ohio; and while said car was thus upon said transfer, and while said T. B. was engaged in inspecting said car, and being under said car at the time, and without fault or negligence on the part of said T. B., the said defendants, their servants and agents, who there, and upon the said railroad, the C., H. V. & T. Railroad, had charge, control and management of the tracks and

switches of said railroad last named, and also of a certain locomotive, called a switch engine and locomotive, then and there in the care, control and management of said defendants, their servants and agents; and it was then and there the duty of the said defendants, their servants and agents, who were then and there in the care, control and management of the switch which connects the said track of the said defendants' said railroad with the said track of the said transfer that connects with the said track of the said C. & A. Railroad, and who were thus running and managing a certain switch engine on the track of the said C., H. V. T. Railroad, to safely keep, control and manage said switch and said engine so as not to endanger the lives and property of persons engaged in working and inspecting cars upon the track of said transfer, and to keep said switches closed while running their engines and cars upon these said switches at said junction, and to run and manage their said engine in a careful manner, and not run the same at a greater rate of speed than the safety of parties working on said transfer would require, and in such manner that their engines should be certainly under the control of the persons in charge thereof.

Yet the said defendants, their servants and agents, on said — day of —, 18—, so carelessly, recklessly and negligently and wantonly managed their said switch, and so carelessly, negligently, recklessly and wantonly run and managed said engine, that said T. B., deceased, was injured and killed in the manner following: While said T. B. was employed as aforesaid stated, and at the time and place aforesaid stated, the said defendants, their servants and agents, were running their said switch engine along and upon their track of their said railroad at a furious rate of speed, to wit, at the rate of thirty or forty miles per hour, and the switchman, one of the servants and agents of said defendant, then and there in control of said switch, negligently and carelessly left said switch open when he should have closed the same, whereby said switch engine, then and there under control and management of said defendants, their servants and agents, ran in and upon the track of said transfer, with great force and violence, and struck one of the cars, of four or five cars standing on said transfer track, shoving and pushing one of said cars so standing upon the said track of said transfer, suddenly and violently, whereby the same ran over the body of the said T. B., then and there almost severing his body, of which injury the said T. B. died within one hour, whereby and of reason of the premises and in the manner aforesaid, the plaintiff says that said defendants, their servants and agents, are guilty of gross negligence in the matter aforesaid stated, and did, in consequence of their said gross negligence, carelessness and recklessness in the control and management of said switch, and

their said switch engine, at said time and place, in not closing their said switch, and in running their said switch engine at a dangerous and reckless rate of speed, said T. B. was run over and killed, in the manner aforesaid stated, without fault on his part.

[*Averment as to widow and heirs surviving.*]

The said estate and family of said T. B., by reason of the wrongs hereinbefore complained of against said defendant, have been damaged in the sum of — dollars, for which sum said plaintiff prays judgment against said defendant.

H. T. V., Attorney for Plaintiff.

NOTE.—From *C. H. V. & T. R. R. Co. v. Breen*, Supreme Court, unreported, No. 2069; 26 W. L. B. 876.

Sec. 892. Petition against railroad company for death caused by drowning from steam railway ferry-boat.—

[*Formal averments as in ante, sec. 882.*]

That said D. L., while in full life, to wit, on the — day of —, 18—, and before that time, was in the employ of the — Railroad Company, the defendant aforesaid, in the county of — aforesaid, and on the day and year aforesaid, in the county of — aforesaid, was employed as a laborer in the employ of the said — on the steam ferry-boat then and there used by the defendant in connection with its railroad in the carriage and transportation of passengers and freight across the Maumee river to T.; and while said D. L., now deceased, was so engaged under the direction of agents and superintendents of said defendant, the said D. L., by a wrongful act, neglect and default of the said agents and superintendents of the defendant aforesaid, while they were concerned in managing and conducting the business of said defendant, was bruised and mangled by the machinery of said boat, and was thereby thrown into the water, and he, the said D. L., was drowned; and so the plaintiff says the death of said D. L. was caused by the wrongful act, neglect and default of said defendant, and without the fault of said D. L. And so the plaintiff further says that T. L., etc., are next of kin and brothers and sisters to said D. L., deceased; the said D. L. leaving no widow, and having no children or child, left said brothers and sisters aforesaid the heirs-at-law of him, the said D. L., deceased; and they, next of kin to the said D. L., deceased, have suffered damages by reason of the aforesaid wrongful act, neglect and default of the said defendant, its servants and agents, in the sum of — dollars.

Wherefore the plaintiff says that he has a right to recover the said sum of — dollars, and asks judgment therefor.

NOTE.—Approved in *Lyons v. Railroad Co.*, 7 O. S. 336.

Sec. 893. Petition against druggist for negligent sale of poison causing death.—

[*Caption and averment of representative capacity, ante, sec. 882.*]

On the — day of —, 18—, at A., Ohio, the said N. G., then in full life, applied to the defendant, who was then and there engaged in the business of selling drugs and medicines and filling prescriptions, which said application was made to defendant through his agent, one F. J. F., and requested defendant, through his agent aforesaid, to put up and sell to him — cents' worth of the oil of sweet almonds, to be administered to his wife, A. G., as a physic, and the defendant by his said agent then and there undertook to fill said order and to sell him, N. G., said medicine for his wife. And defendant did then and there pretend to fill said order, and to sell him said — cents' worth of the oil of sweet almonds, for A. G., as requested; yet defendant by his said agent did so carelessly and negligently put up said medicine, and make said sale, that instead of putting up the oil of sweet almonds, as was called for, he put up and sold to him — cents' worth of a certain poisonous drug called the oil of bitter almonds, to wit, about one-half ounce thereof. And the same was wrongfully, negligently and carelessly sold and delivered to him for his wife by defendant through his agent, instead of the medicine called for; and said A. G. [without any fault or neglect on her part] took the oil of bitter almonds, so put up and sold by defendant as aforesaid, in the same manner and quantity as she would have taken of the oil of sweet almonds, and at the same time supposing it to be such, and the said A. G. afterwards, to wit, on the — day of —, 18—, died from the effects of said oil of bitter almonds, so sold by defendant and so taken by her as aforesaid.

Plaintiff avers that the said A. G. left N. G., her husband, and M. V., etc., her children, as her only next of kin and heirs at law; that by reason of the facts hereinbefore stated plaintiff has sustained damages in the sum of \$—.

Wherefore plaintiff prays judgment against said defendant in the sum of \$—.

NOTE.—From *Davis v. Guarnieri*, 45 O. S. 470. The doctrine of imputed negligence does not prevail in Ohio; therefore contributory negligence in a husband cannot be imputed to the administrator of the wife.

Sec. 894. Answer by railroad company that open switch causing injury to brakeman was opened by person unknown, and that plaintiff contributed to injury by not being in his proper place.—

That the train on which said defendant was at the time of his injury employed was derailed by reason of the switch at or near — station being misplaced, as defendant avers, by

some person not in the employ of the company and to them unknown, and that said switch was opened and misplaced in the night season by such person maliciously, and with intent to wreck the train, and the fact of such switch being thus maliciously opened and misplaced, and remaining open at the time when the train was wrecked, was unknown to this defendant, its officers, agents and servants.

Defendant denies all negligence and want of proper care on its part contributing to such accident and the death of said T., and denies each and every averment in said petition contained, not herein expressly admitted or denied.

Defendant further says that the said T., at the time of his injury, was guilty of negligence and want of proper care on his part, contributing directly to his injury; that said T., although in the employment of the defendant, was not in his proper place and not in the proper discharge of his duties at the time, nor was he acting with proper prudence, caution and care, but at the time he was improperly and unnecessarily riding on the engine of said train, and that his said injuries resulted immediately upon his being at the time so improperly upon said engine, and that had he been in his proper place and where his duties required him to have been at the time, he would have been uninjured; and so the defendant denies all right or claim of damages on the part of the plaintiff and prays to be discharged with costs.

L. C. J., Attorney for Defendant.

NOTE.—From *N. Y., P. & O. R. R. Co. v. Tidd*, Supreme Court, unreported, No. 2507. Robinson, J., charged in this case that the company owed the defendant only ordinary care, and that it did not owe to him the duty of protecting him against the criminal acts of unknown strangers to the company, unless the misplacement of the switch which caused the accident was or ought to have been known to the company, after it occurred and before the harm was done, in time to avert it. And that if he had left his post of duty, which was the cause of the injury, it would prevent recovery. Affirmed by circuit court, dismissed in supreme court.

Sec. 895. General denial by railroad company.—

The defendant, for answer to the petition, denies each and every allegation and statement therein contained, except that it is a corporation, that the plaintiff is administrator as stated, that said A. M. was in its employment and struck by a locomotive pulling a freight train, and that he died, leaving a widow and daughter and other children named, and avers that said decedent by his own want of care caused all the injury and damage complained of.

NOTE.—See *ante*, sec. 70. Under a general denial it may be shown that the injury was caused by the negligence of third persons. *Hoffman v. Gordon*, 15 O. S. 211.

CHAPTER 64.

NEGLIGENCE OF MASTER CAUSING DEATH OF OR INJURY TO SERVANT.

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| <p>Sec. 896. Duty and liability of master considered generally.</p> <p>897. Actions by servant against master—Pleading.</p> <p>898. Negligence of fellow servant.</p> <p>899. Doctrine of <i>respondet superior</i>—When not applicable.</p> <p>900. Assumption of risk by servant.</p> <p>901. Defective machinery and appliances—Rules of law governing.</p> <p>901a. Defective machinery and appliances — Rules of pleading.</p> <p>902. Petition by fireman for injuries sustained while coupling cars under orders of superior servants, which was no part of his employment.</p> <p>903. Petition for injury from explosion of boiler of locomotive.</p> <p>904. Petition by switchman and car-coupler for injury while coupling cars.</p> <p>905. Petition by workman in charge of foreman for injury while unloading cars, caused by negligence in failing to furnish proper tools and appliances.</p> <p>906. Petition by engineer for negligence of conductor in causing collision — Averment as to knowledge of schedule of trains.</p> | <p>Sec. 907. Petition by employee of manufactory against railroad company for injury caused by negligently backing cars up against cars standing on tracks of manufactory under which plaintiff was engaged in cleaning tracks.</p> <p>908. Petition by brakeman for injury sustained by derailment of train on a defectively constructed trestle.</p> <p>909. Petition by employee against company for personal injury resulting from collision.</p> <p>910. Petition by engineer for injury from collision by jumping from engine, caused by negligence of train dispatcher.</p> <p>911. Petition by employee against employer for personal injury to former while blasting furnace.</p> <p>912. Petition by employee against employer for injury caused by explosion of boiler by reason of defective construction.</p> <p>913. Answer of company that employee was injured by his own negligence in disobeying rules.</p> |
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Sec. 896. Duty and liability of master considered generally.—Some general rules of law in respect to the legal relations existing between master and servant, as reflecting upon

actions by the servant against the master for injury, or by the legal representative of the servant against the master for death resulting from negligence, are here discussed, that it may facilitate the consideration of questions of pleading. The discussion, however, must be limited, as the field of adjudication is large. In the absence of a contract to that effect a master is not an insurer of the safety of the servant.¹ He must use only ordinary care and prudence to protect the servant; and while the duty is incumbent upon him to provide safe and suitable machinery and other appliances,² he is not bound to provide the most improved equipments, but only such as are reasonably safe.³ The master is expected to afford only reasonable protection to his employees against such dangers as are incident to their work.⁴ A further duty imposed upon the master, which is in the nature of an implied contract, is that he will use reasonable care and prudence in the selection of his employees or fellow-servants.⁵ All risks which are incident to the nature of the work must necessarily be assumed by the servant, and no recovery can be had for an injury the cause of which was unknown to the master, and could not have been known by the exercise of ordinary care. Nor may recovery be had where the servant had knowledge of the danger and continued in the service without communicating the same to the master.⁶ A master is responsible for the acts of his servant when within the scope of his employment, and the motive or

¹ *Coal & Car Co. v. Norman*, 49 O. S. 598; *Higgins v. Railway Co.*, 48 Mo. App. 547.

² *Dick v. Railroad Co.*, 38 O. S. 389, 394; *Railroad Co. v. Webb*, 12 O. S. 475; *Railroad Co. v. Fitzpatrick*, 42 O. S. 818; *Guthrick v. Wilson*, 14 O. S. 665; *Railroad Co. v. Keary*, 8 O. S. 202; *Railroad Co. v. Barber*, 5 O. S. 541; *Railway Co. v. Corps*, 124 Ind. 427; *Railway Co. v. Duel*, 38 N. E. Rep. 355 (Ind., 1893), and cases cited.

³ *Higgins v. Railway Co.*, 48 Mo. App. 547. It is the duty of a railway company, so far as practicable, to adopt such precautions as will guard its employees engaged in repairing tracks from dangers incident to their

employment. *Dick v. Railway Co.*, 38 O. S. 389. A company is not liable *per se* in adopting a new device without discarding the old, although the use of the two together may be more hazardous. *Railroad Co. v. Henley*, 48 O. S. 608. The greatest care must be exercised by those using dangerous agencies, and this duty cannot be shifted by the master to his servant. *Railway Co. v. Shield*, 47 O. S. 387.

⁴ *Railroad Co. v. Lavelley*, 36 O. S. 221; *Railway Co. v. Murphy*, 50 O. S. 136.

⁵ *Railway Co. v. Ranney*, 37 O. S. 665.

⁶ *Coal & Car Co. v. Norman*, 49 O. S. 598. See *post*, sec. 900.

intention of the servant does not relieve him.¹ The doctrine of contributory negligence cannot be applied to the act of a minor employee to defeat an action for an injury to him, where the negligent act of the minor was committed in the performance of the duty assigned to him, the master having neglected to inform him of the dangers incident thereto.² A servant cannot recover for personal injury resulting from the negligence of another servant, where the injury occurred in a state other than that in which the contract of employment was made, and under the laws of which state no recovery could be had.³

Sec. 897. Actions by servant against master — Pleading. The relation existing between master and servant must be alleged, but it is sufficiently averred by a statement that the plaintiff was in the employ of the defendant.⁴ In an action by a servant against his master for personal injury caused by the negligence of the master, the petition must contain facts sufficient to clearly connect the master with the negligence complained of, showing him guilty thereof.⁵ If injury be caused by the act of a servant of the master, the pleading must charge that the wrongful act was committed while in the master's service and within the scope of employment.⁶ It is not necessary for the servant to allege that his fellow-servant was not guilty of negligence contributing to the injury.⁷ An allegation that a servant of a railroad company was injured while attempting to board a hand-car which was started in motion by a section-boss of the company is sufficiently definite.⁸ It has been held that, where it has been charged that the injury was caused by the master's servants, it should also be alleged that such servants were not the plaintiff's fellow-servants.⁹ Where an employee calls upon

¹ *Railroad Co. v. Young*, 21 O. S. 518; *Railroad Co. v. Wetmore*, 19 O. S. 110; *Railroad Co. v. O'Brien*, 4 O. C. C. 515.

² *Rolling Mill v. Corrigan*, 46 O. S. 283.

³ *Alexander v. Penn. Co.*, 48 O. S. 633.

⁴ *McMillan v. Railroad Co.*, 20 Barb. 449.

⁵ *O'Niel v. Railroad Co.*, 2 O. C. C. 504.

⁶ *Hoffman v. Gordon*, 15 O. S. 211. See, also, *O'Niel v. Railroad Co.*, *supra*, and authorities reviewed.

⁷ *Kentucky Bridge Co. v. Hall*, 125 Ind. 220.

⁸ *Haggerty v. Railroad Co.*, 1 Clev. Rep. 124.

⁹ *Railway Co. v. Dwyer*, 41 Ill. App. 522; *Joliet Steel Co. v. Shield*, 184 Ill. 511; 25 N. E. Rep. 562.

his minor son to render him necessary temporary assistance, and while so assisting the son is injured through the negligence of the servants of the employer, the latter is liable in an action by the son for damages for the injury.¹ But a company is not liable to a brakeman for an injury sustained in a collision which occurred through the negligence of the conductor or engineer of another train, unless the company failed to use ordinary care in the selection of the conductor or engineer, which was the cause of the injury.² A corporation is not liable, in a civil action, to the penalty or forfeiture provided by law³ for its failure to give a discharged employee a reason in writing for his discharge.⁴

Sec. 898. Negligence of fellow-servant.—No question in the law of negligence has been the cause of more contention than the rule as to the liability of the master for injuries caused by the negligence of a fellow-servant. Upon this proposition there has been considerable diversity of judicial opinion. The writer is relieved, however, from entering upon that field of contention, so far as his own state and the relation of master and servant in railroad service is concerned, by reason of a statute recently enacted which provides that every person in the employ of a railroad company, who is given power or authority to direct or control another employee, is not the fellow-servant of such employee, but is the superior of such other employee. And any person in the employ of such company who has charge or control of another employee in any separate branch or department of the company is the superior and not the fellow-servant of such employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed.⁵ This rule, as stated, applies only to railway companies, and therefore does not change the law governing the relation of master and servant in other branches of service as it has heretofore existed as shown by the decisions. The reports abound in interesting and instructive cases upon this most important question, which occupies a very large portion

¹ Penn. Co. v. Gallagher, 40 O. S. 687.

² 87 O. L. 149.

⁴ Rettig v. Railroad Co., 7 O. C. C.

³ Railway Co. v. De Vinney, 17 O. S. 182.

197.

⁵ 87 Ohio Laws, 149.

of the time of courts; but as the purpose here is to examine it only so far as to be able to state a good cause of action by a servant against his master, the discussion must thus be limited. The rule of *respondet superior* is applicable to the relation of superior and subordinate, as between principal and agent or master and servant, and ceases to operate when that relation is at an end. If a master places one servant in a position of subordination to another, and the subordinate is injured through the negligence of the superior, the master is liable therefor.¹ A railway company is liable for an injury occurring to a hand while placed under a foreman engaged in repairing a car.² And a passenger upon a street-car who assists in pushing it upon a side track, at the request of the driver, does not thereby engage in the service of the company as a volunteer, nor is he the fellow-servant of the driver, but becomes an inferior servant, and the doctrine of *respondet superior* applies, making the company liable for an injury resulting to him while so engaged.³

In the absence of an express contract a master is not liable for an injury suffered by an employee through the negligence of a fellow-servant, when no control is given to one servant over another.⁴ And an employer cannot, by a contract entered into with an employee, exempt himself from liability for an injury occurring through the carelessness of other employees who are placed in authority over the one injured.⁵ Where a petition positively alleges the acts and omissions which caused the death of an employee, it will not be presumed that they were those of the fellow-servant.⁶ The fact that an employee was injured by the negligence of a fellow-servant, in executing an unreasonable order which contributed to the injury, will not afford a defense to the action.⁷ The rule is

¹ *Railway Co. v. Lewis*, 33 O. S. 174; *Sullivan v. Railroad Co.*, 58 Ind. 196; *Berea Stone Co. v. Craft*, 81 O. S. 287. ² *Stegeman v. Humbers*, 2 O. C. C. 51.

³ *Railway Co. v. Lavalley*, 36 O. S. 231. ⁴ *Railway Co. v. Spangler*, 44 O. S. 471; 26 Am. Law Reg. 41, and note.

⁵ *Street Railway Co. v. Bolton*, 43 O. S. 224; *Stastney v. Railroad Co.*, 18 N. Y. S. 800. ⁶ *Brown v. Railroad Co.*, 68 Cal. 171.

⁷ *Railway Co. v. Henderson*, 37 O. S. 549. ⁸ *Railroad Co. v. O'Brien*, 4 O. C. C. 515; *Railway Co. v. Arnold*, 81 Ind.

well supported by authority that when the negligence of the master contributes to, or if he has a share in causing, an injury, he is liable, notwithstanding the fact that the negligence of a fellow-servant of the plaintiff also contributed thereto.¹

Sec. 899. Doctrine of respondeat superior — When not applicable.— It is a general rule that the master is liable for the negligence of his servants. But this is not so when the servant is in the exercise of an independent employment not creating the relation of master and servant, and not under the immediate control of the master, the latter being then not liable for the negligence of the former.² Nor does the rule apply where the master retains control over the mode and manner of doing the work by the servant,³ or where the work authorized by him necessarily produced the injury,⁴ or where the injury was one which might have been anticipated as a direct or probable consequence of the performance of the work contracted for.⁵ A mine-owner has been held liable in damages to an employee of a contractor who undertakes to do certain work in the mine for an injury which occurs to the servant of such contractor through want of proper support in the mine.

Sec. 900. Assumption of risk by servant.— As stated elsewhere, the servant assumes all incidental risks, so that no recovery can be had where the cause of the injury was unknown, or, if known to the servant, it was not communicated by him to the master.⁶ It is therefore necessary, to relieve the servant from this responsibility in an action by him against his master for injury, that he should aver in his petition that he was without knowledge of the cause, or, having knowledge, informed his employer and continued in his em-

¹ *Morrissey v. Hughes*, 65 Vt. 558; N. Y. 178; *Tiffin v. McCormack*, 34 27 Atl. Rep. 205 (1898); *Railroad Co. v. O. S.* 642.

Cummings, 106 U. S. 700; *Elmore v. Lock*, 135 Mass. 575. ⁵ *Railway Co. v. Morey*, 47 O. S. 207; *Hughes v. Railway Co.*, 39 O. S.

² *Pickens v. Diecker*, 21 O. S. 215; 461, 476; *Carman v. Railway Co.*, 4 *Foster v. Hooper*, 11 Allen, 421; *Cincinnati v. Stone*, 5 O. S. 88; *Carman v. Railway Co.*, 4 O. S. 399. ⁶ *Kelly v. Howell*, 41 O. S. 498.

³ *Hughes v. Railway Co.*, 39 O. S. 461. ⁷ *Ante*, sec. 896. A person assumes all risks incident to the work and open to visible inspection. *French v. Aulls*, 25 N. Y. S. 188 (1898).

⁴ *McCafferty v. Railroad Co.*, 61

ployment upon a promise by the master to remedy the defect. An averment that the injury occurred without fault of the deceased will not answer.¹ And this is also applicable to a minor. So in an action by a servant who is a minor, to warrant a claim that he was of such an age that he did not fully appreciate the danger of his employment, it must be specially averred that he did not have knowledge of the danger causing the injury, or that he did not possess sufficient capacity by reason of age to enable him to appreciate the danger,—an allegation that he was without fault not being equivalent to an averment of incapacity or want of knowledge.²

In stating a cause of action by a servant against a master the pleader must observe the rules of law applicable to the relationship. There are corresponding duties existing between master and servant. The duties of the former have been elsewhere stated.³ The servant is charged with a duty to the master's property, to the passengers, and property of shippers. If he has knowledge of any defects in machinery, or want of skill in a fellow-servant, it becomes his duty to communicate the same to his master. In an action by him against his master for an injury, his petition should therefore not only aver a violation of the master's duty, but also the performance of the duties imposed upon him, so as to negative contributory negligence on his part.⁴ He should also further allege that he has not assumed the risks which may constitute the cause of his complaint.⁵ A petition by a servant for per-

¹ *Coal & Car Co. v. Norman*, 49 O. S. 598; *Beach on Contributory Neg.*, sec. 16; *Wood's M. & S.*, sec. 414. It is sufficient to aver that he had no knowledge. *Id. Contra*, *Railway Co. v. Pearson*, 128 Ind. 197. As to knowledge, see *Toledo Con. St. R. R. Co. v. Sweeney*, 8 O. C. C. 298, 305.

² *L. S. & M. S. Ry. Co. v. Egan*, 1 *Toledo Legal News*, 64-66 (Ohio Circuit Court, Bentley, J.); *Coal & Car Co. v. Norman*, *supra*; *Rolling Mill Co. v. Corrigan*, 46 O. S. 288. See form of petition in this case.

³ See *ante*, sec. 896.

⁴ See sec. 915, *post*.

⁵ *Railway Co. v. Duel*, 83 N. E. Rep. 355 (Ind., 1898); *Wood's M. & S.*, sec. 432; *Railroad Co. v. Stupak*, 108 Ind. 1; 8 N. E. Rep. 630; *Railway Co. v. Adams*, 105 Ind. 151; 5 N. E. Rep. 187. An employee injured by dangerous machinery, of which danger he has full knowledge, cannot recover. *Connell v. Miller, et al. Co.*, 19 W. L. B. 22. An employee who with full knowledge of all regulations designed for his protection acquiesces therein and continues in the service of his employer is presumed to have taken upon himself the risks of his employment. *Railway Co. v. Eis*, 2

sonal injury resulting from a dangerous place is not defective because it fails to allege that he was ignorant of the danger, as such allegation relates only to the defense of contributory negligence, which must be alleged and proved by the defendant.¹ And it has been held that a railroad company cannot urge as a defense to an injury to an employee, which occurred by reason of the non-repair of a bridge, that such employee knew of the defective condition of the bridge.²

Sec. 901. Defective machinery and appliances—Rules of law governing.—Questions as to the liability of a master for defective machinery and appliances have given rise to considerable litigation. To have a correct knowledge of how to frame a pleading for an injury which occurred by reason of defective machinery, it is essential that the pleader should be advised as to the rules of law bearing upon this question. It bears a close relation to the question as to what risks are assumed by the servant, treated in a former section.³

O. C. C. 3. As to knowledge of rules and regulations, see *Wolsey v. Railway Co.*, 38 O. S. 227. An employee with full knowledge of the continued negligence of his superior fellow-employee, who continues in the services of his master without objections, thereby waives his right against the company and assumes the risk incident to his employment. *Railroad Co. v. Knittal*, 38 O. S. 468; *Manufacturing Co. v. Morrissey*, 40 O. S. 148; *Evansville, etc. R. R. Co. v. Duel*, 38 N. E. Rep. 355 (Ind., 1893); *Railway Co. Sandford*, 117 Ind. 265; 19 N. E. Rep. 770; *Railway Co. v. Corps*, 124 Ind. 427; 24 N. E. Rep. 1046. The peril of services of which an employee has knowledge are its incidents and are assumed. *Railway Co. v. Stupak*, 108 Ind. 1; *Railway Co. v. Watson*, 114 Ind. 20; *Railway Co. v. Corps*, 124 Ind. 427. While a servant assumes all risks incidental to his employment, he assumes only such as are patent and within reasonable knowledge of his observa-

tion, and he has a right to rely on the fact that the master has performed his duty in exercising due care in furnishing safe appliances. *Railroad Co. v. Doan*, 3 Ind. App. 453; *Railroad Co. v. Berry*, 2 Ind. App. 427. See *ante*, sec. 896. In the absence of notice he is not under any primary obligation to investigate for himself. *Railroad Co. v. Hines*, 132 Ill. 161; 23 N. E. Rep. 1031 (1890); *Shearman & Redfield on Negligence* (4th ed.), sec. 92, and cases cited; *Bishop on Non-Contract Law*, sec. 678; *Porter v. Railroad Co.*, 60 Mo. 160. The principle that an employee assumes the risks arising from the negligence of his fellow-servants is not applicable where the injury occurs on the road of another company. *Railroad Co. v. State*, 58 Md. 372.

¹ *Hall v. Water Co.*, 48 Mo. App. 356; *Young v. Iron Co.*, 103 Mo. 328.

² *Groff v. Railroad Co.*, 1 C. S. C. R. 264. See *Toledo Con. St. R. R. Co. v. Sweeney*, 8 O. C. C. 298, 303.

³ See *ante*, sec. 900.

A statute has been enacted affecting railroads only, to the effect that when a defect in machinery is made to appear, that the company shall be deemed to have had knowledge of the defect at the time of the injury.¹

It will, therefore, be appropriate, in considering questions of negligence arising in connection with railroad service, where most of the litigation in this class of cases arises, to refer to the well-established rule that a master is bound to provide reasonably safe machinery, though he is not held to the highest degree of care in this respect, nor is he bound to secure the latest and most improved machinery and appliances, but is held to ordinary care only in the selection, and is responsible for any neglect of this duty.²

It is highly essential that the meaning of the act above referred to, and the duties and liabilities of the master and servant thereunder, respectively, be understood before the mode of pleading can be determined. The construction to be placed upon it is, that the plaintiff may simply produce evidence that defective machinery was the cause of his injury, from which, by force of statute, a presumption arises that the defendant company had knowledge thereof before and at the time of the injury, and is therefore liable; hence if the company does not overcome this presumption it can not escape liability. It can not be overcome by proof which only raises a presumption that the company did not have knowledge; as, for instance, that it employed competent and careful inspectors whose duty it was to properly inspect the machinery or cars. The burden of proof is thereby shifted upon the company.³ The company can only rebut this presumption and relieve itself from liability by showing that in fact it did not have actual knowledge of the defective machinery or cars causing the injury. This it may do by evi-

¹ 87 Ohio Laws, 150.

Am. Rep. 148; *Ford v. Railroad Co.*,

² See *ante*, sec. 896, and cases cited; 110 Mass. 141; s. c., 14 Am. Rep. 598. *Railway Co. v. Erick*, 51 O. S. 146; This duty is a continuing one. ² *Indiana Car Co. v. Parker*, 100 Ind. Thompson on Neg., sec. 984, and cases; *Indiana Car Co. v. Parker*, opinion reviewing authorities extensively; *Lawless v. Railroad Co.*, 130 Mass. 1; *Trask v. Railroad Co.*, 63 Cal. 96; *Corcoran v. Holbrook*, 59 N.Y. 517; s. c., 17 Am. Rep. 546; *Board v. Legg*, 93 Ind. 523; *Rapho Wilson v. Railroad Co.*, 50 Conn. 433; s. c., 47 Am. Rep. 653; *Vosburgh v. Railroad Co.*, 94 N. Y. 374; s. c., 46

supra. Ordinary care requires the master to take notice of the decay, wear and tear of the machinery. *Indianapolis v. Scott*, 72 Ind. 196; v. Moore, 68 Pa. St. 404. ³ *Railway Co. v. Erick*, 51 O. S. 146.

dence that by careful and vigilant inspection of the car or machinery causing the injury near the time of the injury it failed to discover the defects.¹

Sec. 901a. Defective machinery and appliances—Rules of pleading.—It has always been the general rule that in all actions for injuries by a master to his servant it should appear by the pleadings and evidence that the master had knowledge of defects, or that he could have had knowledge thereof by the exercise of ordinary care. It was therefore necessary, in the statement of a cause of action in such cases, that these matters be set forth in the pleading,² although it was held unnecessary to aver that the plaintiff could not by the exercise of reasonable care have discovered a defect unknown to him, when he was without fault in the matter, or the machinery was under the control of another company.³

The statute heretofore mentioned created some confusion in the minds of the bar as to whether it changed the general rule governing the matter. Different views prevailed as to its effect, as to whether it affected the rules of pleading. In the former edition of this work the author said that a safe pleader would aver want of knowledge on the part of the plaintiff,⁴ although the rule is adopted in some states that it is unnecessary for the plaintiff to allege in the first instance want of knowledge of defects; that it is purely a matter of defense, which, to admit of proof, must be pleaded.⁵ But there is another difficulty in the way of solving the question in that manner. If the plaintiff in fact had knowledge, he was then guilty of contributory negligence. Therefore, applying the rule that a servant must, in an action against his master, negative contributory negligence on his part,⁶ he would be required to aver want of knowledge.⁷

¹ *Railway Co. v. Erick*, *supra*; seem to indicate that the plaintiff *Pennsylvania Railway Co. v. Myers*, may merely set forth an injury from defective machinery. But some of the trial courts have held upon demurrer that the plaintiff under the amended statute must aver want of knowledge.

² *Mad River, etc., R. R. Co. v. Barber*, 5 O. S. 541. Where a company which procures a defective brake places a brakeman at work thereon, without an opportunity to know of the defect, and he is injured, a right of action will arise in favor of the brakeman against the company.

³ *Railway Co. v. Shannon*, 4 O. C. Rep. 364.

⁴ *C. 449.*

⁵ The *Erick* case, 51 O. S. 146, would

⁶ *Union Stock Yards Co. v. Conoyer*, 56 N. W. Rep. 1081 (Neb., 1893); *Lincoln v. Walker*, 18 Neb. 244; 20 N. W. Rep. 113; *Mayes v. Railway Co.*, 63 Ia. 562; 14 N. W. Rep. 342; *Wells v. Railroad*, 56 Ia. 520; 9 N. W. Rep. 364.

⁷ See sec. 915, *post*.

⁸ See sec. 900, *ante*.

The statute in question has now been construed by the highest judicial tribunal. It has been held that the general doctrine announced in the *Norman* case,¹ that in actions by a servant against his master for negligence in furnishing appliances, the plaintiff must allege want of knowledge on his part of the defects causing the injury is applicable to railroad service, notwithstanding the fact that the statute raises a presumption of negligence from evidence showing an injury from defective machinery; that the act by its terms affects the rules of evidence, that it is necessary in a petition against a railroad company to recover for a personal injury by a servant on account of defective machinery, to allege that the servant had no knowledge of such defects, or that, having such knowledge, he informed the superior, and continued in the service, relying upon his promise to remedy the defects.²

The theory upon which the court bases its opinion evidently is, as it says, that the statute only affects the rules of evidence; that it does not affect the duty of the employee, nor the rules of pleading with respect to it. The court contends in its opinion that this rule is not complied with by an averment that the injury occurred without fault of the plaintiff, as acquiescence with knowledge is not synonymous with contributory negligence.³ If an employee has knowledge of the defective condition of machinery, and yet continues to use it without performing the duty which he owes—informing his master—even though he uses it with “the utmost care to avert the dangers which they threaten,” is he not guilty of negligence in the use of machinery under such circumstances? Contributory negligence is the failure to observe the proper care and perform his duties as he should under the circumstances, and he does not do so in such case if he uses defective machinery with knowledge and does not inform his master.

¹ 49 O. S. 598.

² *Hesse v. C. S. & H. R. R. Co.*, 58 O. S. 168; *Railroad Co. v. Hedges*, 15 O. C. C. 254; 8 Oh. Dec. 265.

³ *Id.* This finds support in *Street Ry. v. Maier*, 9 O. C. C. 268, 271, holding that an allegation that

plaintiff was without fault was not equivalent to an averment of want of knowledge. This was the case of a minor; it would be proper to make some special averment in such case.

The petition in this class of cases must, where the servant had equal means of knowledge, allege that his master knew, or by the exercise of reasonable diligence could have discovered, the defects in the machinery or appliances.¹ Where the usual averment is made that the servant, upon discovering the defect, informed the defendant, it is not necessary that a further averment be made that the plaintiff did not have equal means of knowledge of the defects with the defendant.* It is not necessary to specifically describe the defects, as the rules of pleading can require no more particularity than the nature of the thing pleaded admits, especially where the facts lie more in the knowledge of the opposite party than of the pleader, in which case considerable generality of expression may be allowed. The servant may be injured in consequence of a defect in machinery not under his control, in which case he can not be expected to know where the defect was; and to require him to describe it particularly would be to deny him a remedy. The proper allegation to be made by him is, that the defendant knew, or but for the want of reasonable diligence and care on his part would have known, of the defects.²

An employee who has suffered an injury brought about by the violation of instructions given him by his principal cannot subject the latter to any liability on account thereof.³

Sec. 902. Petition by fireman for injury sustained while coupling cars under orders of superior servants, which was no part of his employment.—

[Caption and averment of corporate character.]

On the — day of —, 18—, the plaintiff was, and for a long time prior thereto had been, in the employ of said defendant as a fireman, and not otherwise, on its locomotive engines engaged in the operation of said railroad.

On said — day of —, 18—, the engineer then in charge of the engine on which plaintiff was employed, and belonging to or under the control of the defendant, received orders and

¹ *Mad River Railroad Co. v. Barber*, Louisville, etc. R. Co. v. Utz, 33 N. E. 5 O. S. 541; *Wood's Master & S.*, sec. 386; *Buzzell v. Manufg. Co.*, 48 Me. 113; *Evansville Ry. Co. v. Duel*, 33 N. E. Rep. 355 (Ind., 1893), and cases cited; *Cox v. Gas Co.*, 17 R. I. 199; 21 Atl. Rep. 344 (1891); *Noyes v. Smith*, 28 Vt. 59. See *Bates on Pldg.*, p. 562; 2 *Yaples on Pldg.*, p. 1177; *Maxwell on Pldg.*, pp. 241-44. *Contra*, *Louisville, etc. R. Co. v. Utz*, 33 N. E. Rep. 881 (Ind., 1892); *Railway Co. v. Percy*, 27 N. E. Rep. 479; 128 Ind. 197; *Johnston v. Railway Co.*, 31 Pac. Rep. 283 (Oreg., 1893).
² *Cox v. Gas Co.*, 17 R. I. 199; 21 Atl. Rep. 344 (1891); *Noyes v. Smith*, 28 Vt. 59.
³ *Wolsey v. Railroad Co.*, 33 O. S. 227.

* *Barbour v. Miles*, 7 Oh. Dec. 682.

directions from the superintendent of said road or other employees thereof, superior in authority over said engineer and the plaintiff, and whose orders in that behalf it was the duty of said engineer and plaintiff to obey, to the effect that said engineer and engine should work extra between the stations of W. and G. on the line of defendant's said railroad, with flags out against all trains until they came in sight, and that all trains would look out carefully for them until they came in sight, which extra work consisted in the movement of said engine from place to place, picking up and leaving freight cars between said limits, coupling, uncoupling and switching cars, and such other work as the business of the defendant required on that day, and required the aid and services of a full crew of hands to man the same and do said work, the defendant, well knowing the premises, carelessly and negligently omitted and failed to provide sufficient help and assistance to do such work on said day.

That said engine and the work to be done by it was wholly without a conductor or other person, except the said engineer, to take charge of and direct the same, and by reason of the premises said engine and the plaintiff and all the work to be performed by it were placed under the charge and control of said engineer, who thereupon took charge of the same and directed and controlled the same in the capacity of a conductor and director of said work, and all orders and directions of the defendant as to doing said work were communicated to and received by said engineer.

That said engineer was then and thereby, by the defendant, placed superior in authority over the plaintiff during said day, whose orders and directions it then and thereby became and was the duty of plaintiff to obey, and he received all his orders and directions from said engineer and no one else.

On said — day of —, 18—, while said engine was under the charge and control of said engineer, at a point about — miles west of —, on the defendant's road, said engine was standing on the main track attached to a string of six — cars, which had been loaded with railroad ties, said engine facing west. In the rear of said — cars and standing on the same track were — other similar cars standing some — feet distant from the other cars which were attached to the engine. On said day and while said cars were so standing, said engineer, so placed in charge of said work by the defendant, whose orders and directions in that behalf it was then the duty of plaintiff to obey, directed plaintiff to go to the opening between said strings of cars and make the coupling between them, while the engine shoved said — cars back against the others, to enable plaintiff to make the coupling, which order plaintiff proceeded to obey and went between said cars for the purpose of making said coupling, and,

with the exercise of all reasonable care on his part, was proceeding to make the same when said engine with cars attached were, without warning or notice by said engineer, carelessly and negligently and with great force and violence suddenly forced back, bringing said cars suddenly together; and, not being able to escape, plaintiff's right arm was caught between said cars and crushed at the elbow, as hereinafter stated.

That the work of coupling said cars or the doing of other work of a brakeman or switchman by plaintiff was no part of his employment by the defendant; that he was never employed by defendant for such work but solely as a fireman on engines; at the time he was so ordered by his said superior, and when attempting to make said coupling, he was wholly without experience in said work and unskilled, and without knowledge as to the way of doing the same or the manner of avoiding the danger and hazard attending such work, as defendant well knew.

That the work of coupling cars is and was much more hazardous and attended with much greater danger than the work of a fireman, which plaintiff was employed by defendant to do, which plaintiff at the time he undertook to make said coupling did not appreciate and understand, and with the knowledge at his command and want of experience he could not and did not know, which was well known to defendant.

Plaintiff says he sustained the injury aforesaid without any fault on his part and through the negligence of the defendant in failing and omitting to furnish sufficient hands and help to do the work of said engine, and in sending the two switchmen and the conductor that belonged with said engine to do other work at —, instead of allowing and requiring them to go with said engine, and through the negligence of said defendant, through its said engineer in ordering and directing plaintiff to make said coupling, and in sending said cars by said engine back onto plaintiff in a reckless and careless manner as herein set forth, he has sustained damages by reason of the premises in the sum of \$—, for which amount he asks judgment against the defendant.

NOTE.—From *Pennsylvania Co. v. Hinkley*, error to circuit of Lucas county, Ohio, Supreme Court, unreported, No. 8115.

Duty as to furnishing employees.—Pugsley, J., charged that: It was the duty of the railroad company to use ordinary and reasonable care to furnish an adequate number of competent employees to properly manage the engine and train of cars upon which the plaintiff was working; that is, it was the duty of the company to use such care in that respect as ordinarily prudent persons or corporations engaged in like business usually exercise under the same circumstances. If the evidence shows that the train was not furnished with an adequate force of men, to make the company liable it must be shown that the inadequate force of men occasioned the injury, or was the proximate cause thereof.

Knowledge of inadequate force.—Pugsley, J., further charged that: If the injured person proceeded on the train as fireman knowing that there was no conductor or brakeman in charge of the train, and that he would be

required to perform the duties ordinarily performed by such conductor and brakeman, then he assumed the extra risks incident to such employment.

Superior servant.—Pugsley, J., further charged that: If the evidence shows that the fireman attempted to make the coupling under the direction of the engineer, an inquiry must be made whether such order or direction was a negligent or wrongful act. To hold the company, it must appear that the engineer was guilty of negligence in giving the order, and that by the act of the company the engineer had the control of the train upon the day of the injury, and that the fireman, as one of the employees, was under the direction and control of the engineer in the management of the train; that the engineer was a superior servant of the fireman.

Sec. 903. Petition for injury from explosion of boiler of locomotive.—

[*Formal averments.*]

That on the — day of —, 18—, the defendant was in the employment of the defendant as — upon a locomotive engine No. —, belonging to said defendant, and propelled by steam on said road; that it was the duty of the defendant to provide a safe locomotive with good and secure apparatus and machinery, but the defendant, disregarding its duty in this respect, negligently and carelessly provided a defective and unsafe locomotive for the use of plaintiff [of which it had due notice, and of which plaintiff had no notice].

That on said day, and while said locomotive was being used by said defendant upon said road, and while the plaintiff was in the employment of said defendant as aforesaid, the boiler of said locomotive, by reason of its weak and defective condition, and without fault on the part of the plaintiff, exploded, whereby boiling water and steam were thrown into the face and eyes of the plaintiff, by reason of which he was rendered blind, and is unable to earn a livelihood; that he has expended the sum of \$— for medical service and medicine.

That the plaintiff has sustained damages in the sum of \$—, for which he prays judgment.

NOTE.— See *ante*, sec. 901; 87 O. L. 149. The mere fact of explosion does not raise a *prima facie* case of negligence. *Huff v. Austin*, 46 O. S. 386; *Walker v. Railroad Co.*, 71 Ia. 658. There must be affirmative proof of negligence. *Loose v. Buchanan*, 51 N. Y. 476. See *Marshall v. Wellwood*, 38 N. J. L. 339.

Sec. 904. Petition by switchman and car-coupler for injury while coupling cars.—

[*Formal averments.*]

Plaintiff, on the — day of —, 18—, was in the service and employment of defendant at its yards in — as a switchman and car-coupler. On said date, while engaged in said service and in the exercise and performance of his duty, he was injured without any fault or negligence on his part, but by the neglect and carelessness of the defendant in manner following, to wit: Plaintiff was employed as one of the crew of the pony engine which was engaged in making up freight

trains and transferring cars. He was under the orders and directions of the conductor of said defendant, M. D. The engine was being backed up for the purpose of making a coupling and connecting with a flat-car on the main track running to the freight-house in said yard, and plaintiff was directed by his said superior officer, the conductor of the engine, to make the coupling. For that purpose he had placed himself on the foot-board at the rear of said engine, which was the usual and proper place for the car-coupler when about to make the car coupling; and as the engine approached he took hold of the link attached to the engine for the purpose of guiding it into the draw-bar of the car with which it was proposed to make the coupling. The car, however, with which he was endeavoring to make the coupling had been by the neglect and carelessness of the defendant loaded, or permitted to remain loaded, in such a manner that it was dangerous for any one to make the coupling, as was known, or by the exercise of due and ordinary care could have been known, to said defendant, in that it was loaded with old railroad iron which had been taken from the track and placed on said car in such a manner that the ends thereof projected over and beyond the end of the car, and beyond the draw-heads of the draw-bar, and not room enough given to permit a car-coupler to make the coupling. Plaintiff, while exercising proper care in making the coupling, was pushed by the engine on and towards said flat-car so defectively and dangerously laden, and caught in between the projecting rails and dead-wood of the engine, and his body squeezed therein, and was severely and badly wounded and injured on and about the right hip and side. Plaintiff says that he had no notice or knowledge of the defective manner in which said car was loaded, nor did he have time to avoid the injury. He further says that the engine on which he was standing was defective [as was known to defendant], in this, to wit: That it was not at all times under the control of the engineer, and was liable to give a sudden start ahead, owing to some defect in the machinery and without any act of the engineer.

Plaintiff says that said engine at this time so started suddenly ahead that he did not have time to avoid said injury. He says that in consequence of the injury so received, as a result of the carelessness and negligence of the defendant, he was [state injury]. Plaintiff has been damaged in the sum of — dollars, for which amount he asks judgment against defendant.

H. & F.,

Attorneys for Plaintiff.

NOTE.—From C. H. & D. R. R. Co. v. Judge, error to circuit court of Lucas county, Supreme Court, unreported, 25 W. L. B. 136, affirming trial court, in which R. C. Lemmon, J., charged the jury that the plaintiff had a right to assume that the car which they were approaching (for the purpose of coupling) might be approached as they were approaching it, and that it

might be coupled to the engine without unusual hazard, unless he was informed to the contrary either by his own sight, or by something that had been told him, or unless by the exercise of ordinary care he could have seen the danger in time to avoid it. See *Lothrop v. Railroad Co.*, 150 Mass. 424; *Haugh v. Railway Co.*, 78 Ia, 66.

Sec. 905. Petition by workman in charge of foreman for injury while unloading cars, caused by negligence in failing to furnish proper tools and appliances.—

[Caption and formal averments.]

That on the — day of —, 18—, the plaintiff was in the employ of the defendant as a workman to unload its cars, and for that purpose was placed by the defendant, with other workmen of the defendant, under the control and subject to the orders of a certain foreman of the defendant.

That on said day the plaintiff and said other workmen were ordered by said foreman to unload certain large and heavy beams of channel iron from a car onto the platform of the defendant at its depot, in the city of T., in said county; and while said other workmen, under the direction and supervision of said foreman, were endeavoring to unload one of said beams from the car to said platform, without the fault of the plaintiff, and through the negligence of the defendant and its said foreman in not there having the proper tools and appliances, and in not having sufficient force to handle said beam, and in not having such force properly applied, the said beam slipped from said car and fell onto and broke and fractured the leg of the plaintiff, who was then on said platform in obedience to the orders of said foreman.

That by reason thereof the plaintiff became, and was for a long time, sick, and said leg continues sore, and the plaintiff has become a cripple and prevented for life from activity pursuing his business; and was otherwise injured.

The plaintiff, by reason of the premises, has sustained damages to the amount of — dollars, for which he asks judgment.

J. R. S.,

Plaintiff's Attorney.

NOTE.—From *Pennsylvania Co. v. Haydock*, error to circuit court of Lucas county, Supreme Court, unreported. Verdict for plaintiff affirmed by circuit court and settled in supreme court.

Sec. 906. Petition by engineer for negligence of conductor in causing a collision — Averment as to knowledge of schedule of trains.—

[Caption and averment of corporate character.]

That on the — day of —, 18—, said plaintiff was, and for a long time prior thereto had been, in the employ of said defendant as one of its locomotive engineers, and that one J. K. was conductor of the crew to which said plaintiff had been theretofore assigned by said defendant, and with which he

was working on said day; and that while in the discharge of his duty to said defendant, under his said contract of employment, he was, by the rules and regulations of said defendant, bound and required to obey implicitly the orders of his said conductor, and that on said day he was placed by said defendant in charge of one of the locomotive engines, known as engine No. —, subject to the control of said K., who, as conductor of said crew and engine, had from said defendant full power and authority over said plaintiff to order and direct him when to start and stop, and where to run said engine, and when to start and run the same onto and over the main track of said railroad, or of said branch or any part thereof; that on said — day of —, 18—, one of the trains of said defendant, which was a mixed passenger and freight train, and which was known as train No. —, left said S. a little behind the schedule time, to run over said branch of said railroad to said city of Y., and by the time schedule of said defendant was due in said city at — A. M., and that said conductor on said day had in his possession a copy of said time schedule, which showed the arriving time in said city of said train No. —, and then knew and for some time before had known said arriving time of said train No. —; that said engine had no time on said time schedule, and whenever said defendant desired to run said engine over the main track of said railroad, or of said branch between stations, said defendant, by its train dispatcher, issued a running order to said conductor, whose duty it was to deliver a copy of the same to said plaintiff, and whose duty it also was, after receiving a running order, to direct said plaintiff when to start and make the run; and whenever directed to start and make the run by his conductor said plaintiff was bound and required to obey, and whose duty also required him to first determine and know, before giving said plaintiff the order to start and make the run, whether or not the same could be made in safety. That on the morning of said day said conductor received from said train dispatcher orders to run said engine over said main track from said city to D. station, and that after receiving said order, and after said train No. — was, by said time schedule, due in said city, to wit, about — A. M., said conductor, having from said defendant full authority so to do, ordered said plaintiff to start and run said engine from said city to said D. station. And thereupon said plaintiff, as he was bound and required by said rules and regulations to do, undertook to execute said order, and while running said engine over said main track, in the direction of said D., the same collided with said train No. —, which was running over said track in the direction of said city; and that when said engine and train collided, said plaintiff was by the force thereof thrown violently to the ground, and the broken pieces of said engine and train fell upon him, and he

received thereby, and as the direct result thereof, the personal injuries hereinafter described and stated. That if said conductor did not know, he by the exercise of ordinary care must have known, and it was then and there his duty to know, that said train No. — had not arrived at its destination in said city at the time he ordered said plaintiff to make said run with said engine No. —, and yet, without determining, as he was bound to do, that said train No. — had not arrived, and knowing full well that said plaintiff would, and had a right to, rely upon his information and word in reference thereto, said conductor carelessly and negligently ordered said plaintiff to start and make said run before said train No. — had arrived; and that as the direct result of the careless and negligent act of said conductor in giving him said order said plaintiff received said personal injuries, and without any fault or neglect on his part, and while he was in the faithful discharge of his duty to said defendant under said contract. That in said collision, and as a direct result of the negligence of said conductor as hereinbefore stated, said plaintiff received three severe blows on the head [*allege nature of injuries and special damages*].

That said plaintiff, on account of said negligence and said injuries resulting directly therefrom, has sustained damages in the sum of — dollars, for which sum, with interest from said — day of —, 18—, and costs of suit, said plaintiff asks judgment against said defendant.

W. S. A.,

Attorney for Plaintiff.

NOTE.—From *L. S. & M. S. Ry. Co. v. Lindsay*, Supreme Court, unreported, affirming judgments of circuit court and common pleas courts of Mahoning county, Ohio, in which Gilmer, J., charged that the company were liable if it appeared that by the rules of the company the engineer was under the control or command of the conductor, and bound to receive orders and instructions as to starting and running, and that if the plaintiff did nothing more in starting and running the engine and train than to obey the command of his superior in authority, he was not guilty of contributory negligence, and if the conductor was guilty of negligence which was the proximate cause of the injury, that would in law constitute negligence of the company.

Sec. 907. Petition by employee of manufactory against railroad company for injury caused by negligently backing cars up against cars standing on tracks of manufactory under which plaintiff was engaged in cleaning tracks.—

[*Caption and averment of corporate character.*]

That the said defendant, on or about the — day of —, 18—, and for a long time prior thereto, owned, operated and controlled certain tracks, switches and turnouts leading toward and into what is the premises of the G. Iron Company, at G., — county, Ohio.

Defendant on said day and for a long time prior thereto

was using, occupying and controlling a certain track leading toward and into said G. I. Company's premises, and the said track so used and occupied was built upon trestle work, and was used by said defendant for the purpose of running in loaded cars of coke, and having the same unloaded therefrom by the employees of the G. I. Company.

That on or about said — day of —, 18—, about nine cars loaded with coke were run upon said trestle work for the purpose of being unloaded by the G. I. Company, and this plaintiff, together with three other men (all of whom were in the employ of the G. I. Company), under the orders and directions of the G. I. Company, had unloaded about five of said cars, and as soon as each car was unloaded, this plaintiff, together with said men, would go under said car, under the directions and orders of said G. I. Company, and with the full knowledge of defendant, to clean and clear the track, as aforesaid, of the coke that would fall upon said track by reason of the unloading of the same.

That said track was built and used only for the purpose of running loaded cars of coke toward and into the premises of the G. I. Company to be unloaded, and that on said day the said defendant, without any cause or reason therefor, wrongfully, negligently and unnecessarily used said track or trestle work for the purpose of doing switching, knowing that the same was filled with cars loaded with coke, and that the same were being unloaded by the employees of the said G. I. Company, and that they necessarily would be and were under said cars at said time.

That this plaintiff, together with three other men, all of whom were in the employ of the G. I. Company, and while in the due discharge of their duties, and by orders of the G. I. Company, and with full knowledge of said defendant, were under one of the said cars that were standing upon said trestle work, and which they had just unloaded, and were cleaning and clearing the said track and trestle work of the coke that had fallen upon the track and piled up between the rails thereof, when the said defendant, well knowing that this plaintiff was under said car, and that he was there by the directions of the said G. I. Company, and well knowing the condition of said track, and that the same was filled full of coke between the rails, and that it was necessary for the said plaintiff to go under and be under the said cars at said time, so as to clean and clear the said track of the said coke, so that the said unloaded cars might be taken from said trestle work onto said main track, and without giving any warning or notice by bell, whistle or otherwise, and while unnecessarily and wrongfully using said trestle work for switching purposes, recklessly, carelessly and negligently run an engine and a train of cars down said main track and up said trestle work, and

against the cars standing upon said trestle work as aforesaid, and under which this plaintiff then was cleaning, clearing and removing coke as aforesaid.

That said train and engine was run by said defendant as aforesaid, up said trestle work, at a high rate of speed, and in a reckless and careless manner, and struck said cars with great force and violence, and thereby drove said cars suddenly backward, and caused the wheels thereof to pass over the leg of this plaintiff, and crushed and mangled the same, and cut and bruised his body, this plaintiff at all times using care and prudence in and about his said employment, and without any fault or negligence on the part of this plaintiff, to the damage of plaintiff in the sum of \$——.

Wherefore plaintiff prays judgment against the said defendant in the sum of \$——, his damages aforesaid sustained, together with his costs herein.

NOTE.—From *Pennsylvania Co. v. Lombard*, 49 O. S. 1.

Sec. 908. Petition by brakeman for injury sustained by derailment of train on defectively constructed trestle.—

[*Formal averments.*]

That on the —— day of ——, 18——, said railroad tracks were so being used by said P. & L. E. Railroad Company and its employees who were engaged in backing a train of one locomotive and cars up the said tracks toward said furnace, when a part of said cars became derailed and thrown upon said trestle work and caused said trestle work to give way and precipitate said cars through the same to the ground, causing the injury to this plaintiff hereinafter more particularly described.

That said trestle work was negligently and carelessly constructed, and was without sufficient strength to support such trains of cars as were designed to be, and in fact were, used thereon; that the timbers used in said work were of insufficient strength, and there were not a sufficient number of cross ties thereon to render said trestle work safe; that said defendant carelessly and negligently permitted said track to become out of repair and unsafe in this, to wit: [*State how.*] And which facts the defendant then well knew, and neglected and refused to repair said tracks and properly adjust and secure said guard rail; that said guard rail, in the condition aforesaid, rendered said track dangerous to persons engaged upon said cars and locomotive, which defendant well knew, and said said guard rail in said condition did not serve the purpose for which it was placed there, and which it would have served if the same had been fastened and braced to said timbers and cross ties, and that in consequence of the said condition of said guard rail said cars became derailed as aforesaid, and in consequence of said defective trestle work as aforesaid, and

the said condition of said guard rail, said cars were precipitated to the ground below. Plaintiff says that defendant was guilty of gross carelessness and negligence in so constructing and maintaining said trestle work and track thereon, and in permitting said guard rail to become and remain so as aforesaid out of repair and detached from said track and not properly braced, and in neglecting and refusing to repair said track and properly fasten and brace said guard rail; that plaintiff, at the time of his injury, had no knowledge or notice of the condition of said trestle work and tracks and said guard rail, and of the consequent dangerous condition of said tracks, and the danger incurred by him in entering thereon, and was in the exercise of proper and ordinary care in the discharge of his duty.

That on said — day of —, 18—, he was an employee of said railroad company in the capacity of a brakeman on the train so as aforesaid then being backed up and over the track of said defendant to said furnace, and was so in the discharge of his duty when said cars became derailed and were precipitated through said trestle work as aforesaid, and when said cars became so derailed and were falling through said trestle work, and in consequence of said cars being derailed and the falling of said trestle work, the plaintiff, in the exercise of ordinary care, was obliged to and did, in order to save himself from fatal injury, jump from said train and from his place of duty thereon to the ground below, and received the injuries herein complained of; that by reason of said carelessness and negligence of defendant, he received [*state nature of injuries*], and that by reason of said careless and negligent acts of said defendant he has been damaged in the sum of — dollars, for which he prays judgment against defendant.

W. S. A. and C. R. T.,

His Attorneys.

NOTE.— Modeled from Ohio Iron & Steel Co. v. Campbell, Supreme Court, unreported, No. 2708.

Sec. 909. Petition by employee against company for personal injury resulting from collision.—

[*Caption and formal averments.*]

That before and on the — day of —, 18—, said defendant was operating a certain railway running from — to —, in the state of —, and was running and operating two locomotives and trains of cars attached thereto, the one thereof running from — to — and back again the ensuing day, and the other thereof also running from — to — and back again the ensuing day.

That the said locomotives with their respective trains were required to meet and safely pass each other at P., in the

county aforesaid, by the express direction and arrangement of the defendant, according to its schedules.

That at the time above stated, and at the time the injuries hereinafter stated occurred, the plaintiff was employed by the defendant as an engineer upon one of said locomotives, and was required by the rules and regulations of said defendant to stop the locomotive in his care and control at P. and there to safely pass the other locomotive above described.

That the defendant on the — day of —, 18—, changed the place of meeting of the last-mentioned locomotives from — to —, said change to take effect on the ensuing day, to wit, on the — day of —, 18—, without giving plaintiff notice of said change, by reason whereof plaintiff, while proceeding in the capacity of engineer of said locomotive, with the train thereto attached, from — to —, on the — day of —, 18—, according to the previous express directions, orders and arrangements of said defendant, and while between — and —, on said railroad, the other of the said locomotives, without any fault on the part of the plaintiff, ran against and came into collision with that upon which the plaintiff was engineer and crushed the same, whereby the plaintiff was scalded, burned and wounded, and was sick for the period of — months, to his damage in the sum of \$—.

[*Prayer.*]

NOTE.— Modeled from Little Miami R. Co. v. Stevens, 20 O. 416.

Sec. 910. Petition by engineer for injury from collision by jumping from engine, caused by negligence of train dispatcher.—

[*Caption and formal averments.*]

That on the — day of —, 18—, he was in the employ of said defendant as an engineer, and as such engineer had charge of engine number —, an engine used for the purpose of operating the said railroad by said defendant; that as such engineer he was in duty bound to obey all orders issued and given to him by the superintendent and train dispatcher (agents of said defendant in operating said railroad) or either of them.

That on said — day of —, 18—, one R. G. S. was the duly appointed and acting superintendent and acting train dispatcher of said defendant at A., Ohio; that on said — day of —, 18—, said defendant, by its said superintendent and train dispatcher R. G. S., he, the said R. G. S., being fully authorized by said defendant in that behalf, issued an order to this plaintiff to run his said engine number — extra from A. to C. and return regardless of train — (which train — was a regular freight train used and run on said railroad), and plaintiff says that he proceeded immediately with said engine

extra to C. in obedience to said order, where in pursuance of proper orders he attached a flat-car loaded with brick to the front of said engine, and immediately started with all proper haste to return to A. with said flat-car loaded with brick attached to the front of the engine; that by the negligence and default of the said defendant, through its officers and agents and said R. G. S., superintendent and train dispatcher of said defendant, the said freight train number — was permitted to proceed from A. toward C. on the same track upon which the plaintiff was required to run his said engine number — extra from C. to A., and at the same time, and before it was possible for the said plaintiff to bring his said engine number — extra to A., and while returning to A. on said engine number —, and in obedience to the orders of said superintendent acting as train dispatcher as aforesaid, and when within about two miles of the depot at A., at a sharp curve in said railroad, the said train number — and said engine number —, upon which said plaintiff then was, came in collision, wrecking both of said trains. That owing to the curve in said railroad and to the fact that there are very high steep elevations of land on the inside of said curve, which obstructed the view of said train — as the same was approaching the engine upon which the plaintiff then was, the said plaintiff could not see or observe the said train number — until the same was within about five hundred feet of the engine upon which he then was.

The plaintiff says that at the time he first saw train — approaching, said engine number —, upon which he was, was going at the rate of twenty miles per hour, and said train number — was moving toward him at the rate of about twenty miles per hour, and owing to the close proximity of said trains and the rate of speed they were going, a collision of the same was inevitable. When the plaintiff saw train number — approaching, he reversed his engine, put on the brake, and in order to protect himself from certain death he leaped from said engine and struck upon an embankment at the side of said railroad upon his head, back, right shoulder, thigh and leg, producing great and severe shock to his entire nervous system and concussion of his brain and spine, also injury to his right side, hip, thigh and knee, all of which injuries were caused and done by defendant the C. A. & C. Railway Company by its agents, servants and employees, whose names are unknown to this plaintiff except the name of said R. G. S. aforesaid, who was one of said agents.

The plaintiff says that it was necessary, prudent and proper for him to leap from said engine number — when he did, and had he not so leaped from the same he would have been killed by reason of said collision; and that all of said injuries aforesaid were caused by said defendant by the negligence,

carelessness, default and wrongful acts of the said defendant through its officers, agents and employees and servants as aforesaid, without fault on his part, whereby, by reason of said injuries so caused as aforesaid, this plaintiff has ever since said — day of —, 18—, suffered and still is suffering great physical pain and mental anguish, and is entirely disqualified from performing labor as an engineer or any physical labor whatsoever, and that he will be so disabled for a long time to come by reason of said injuries, and that said injuries are permanent. That during all of said time since said — day of —, 18—, the plaintiff has [*here state special damages*].

The plaintiff further says that he is — years of age, that he is an engineer by profession, well qualified to discharge the duties of an engineer; before he received the injuries aforesaid he was able to earn and did earn the sum of \$—— per day, and were it not for said injuries he would have earned \$—— per day ever since said — day of —, 18—; that by reason of said injuries he is now and ever hereafter will be entirely disqualified from following his profession as an engineer.

The plaintiff says that by reason of the premises aforesaid he has suffered damages in the sum of \$——.

NOTE—From C. A. & C. Ry. Co. v. Umstead, error to circuit court of Summit county, Supreme Court, unreported, No. 2481. Green, J., charged the jury: That all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it be in different grades and departments of it, are fellow-servants. Where different persons are employed by the same principal in a common enterprise and no control is given to one over the other, no action can be sustained by them against their employer on account of any injuries sustained by one agent through the negligence of the other.

But when one servant is placed by his employer in a position of subordination, and subject to the orders and control of another, and such inferior servant is without fault, and, while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for the injury. That if the evidence shows that the plaintiff (engineer) was by the terms of his employment placed under the control and bound to obey the orders of the train dispatcher, and was injured while he was in the discharge of his duties in obedience to the orders of the train dispatcher, and without any fault of his, by reason of the negligence of the train dispatcher, then the company is liable.

Sec. 911. Petition by employee against employer for personal injury to former caused while blasting furnace.—

The defendant is a corporation duly incorporated under the laws of the state of Ohio, and engaged in mining and manufacturing in the said county of —, Ohio, and was so incorporated and engaged at the time of the commission of the acts hereinafter complained of.

Immediately prior to, and on the — day of —, 18—, plaintiff was in the employ of the defendant, in its furnace at — county, Ohio. On or about said — day —, 18—, the

defendant undertook to blast a certain hearth in its said furnace at —, Ohio, which hearth, prior to said date, had been heated to a degree that would ignite blasting powder, but on said day had become cool to the depth of eighteen inches, but beyond that depth it was still hot enough to ignite blasting powder; of all of which facts the defendant had full knowledge. On said — day of —, 18—, the defendant, preparatory to the blasting of said hearth, and well knowing all the foregoing facts, caused a hole to be drilled in said hearth to the depth of about thirty-six inches, and a charge of about three pounds of blasting powder to be inserted therein, and negligently and carelessly ordered the plaintiff to tamp said hole with clay. The plaintiff, being ignorant of the fact that said hearth was so heated, and had not sufficiently cooled down as aforesaid, and believing that it would be safe to obey said order, without fault or negligence on his part, and in obedience to said order, began the tamping of said hole with clay, as ordered by defendant to do, when, owing to the said heated condition of said hearth, the said charge of blasting powder ignited and exploded, and, without fault or negligence on part of plaintiff, threw a large quantity of burnt powder, cement, brick, iron and pieces of broken stone upon and against the plaintiff, which powder, cement, brick, iron and stone struck plaintiff on the face, eyes, head, arms, hands, breast, body and legs, and bruised, mangled and wounded all of said parts, and rendered plaintiff permanently blind in both his eyes, permanently weakened and impaired his hearing, permanently injured and disfigured his face, wounded his mouth and knocked out one of his front teeth, broke and permanently crippled his right leg, wounded and permanently crippled his right hand, and bruised and mangled his breast and body in many places. Plaintiff's nervous system was greatly and permanently shocked and broken down by the injuries aforesaid; he has thereby been rendered permanently blind in both eyes, permanently crippled in his right leg and right hand, and totally disabled from performing any labor of any kind.

Plaintiff, by reason of the injuries aforesaid, was prostrated for a period of about six months, and his health has been greatly and permanently injured thereby.

Plaintiff has been damaged by reason of the premises in the sum of \$—, for which sum he asks judgment against the defendant.

H., S. & M.,

Plaintiff's Attorneys.

NOTE.—From *C. H. C. & I. Co. v. Spray*, error to circuit court of Athens county, Supreme Court, unreported, No. 1667. See *Spelman v. Iron Co.*, 56 Barb. 151.

Sec. 912. Petition by employee against employer for injury caused by explosion of boiler by reason of defective construction.—

That on the — day of —, 18—, while in the employ of J. A. F. & Co., of the city of C., and as such employee, while he was setting up and placing in working order a band log saw-mill on the premises of the defendants, which saw-mill the defendant J. A. had just purchased of the said J. A. F. & Co. under an agreement between them that the said J. A. F. & Co. should set up and place in working order the said saw-mill on the premises which he should and did select near L., Ohio, he, this plaintiff, was by and through the explosion of the boiler owned by the defendants, and used and controlled by them to run the said saw-mill, which explosion was caused by the defectiveness and insufficiency of the said boiler and engine, and of the construction, material, and long use and age thereof, and by and through the carelessness, unskilfulness and improper conduct and default of the said defendants, agents and servants in that behalf and in the running, managing and conducting of the said boiler and engine, whereby the said boiler was exploded and broken in pieces, and parts thereof thrown with great force and violence against this plaintiff, causing, without any fault or negligence on his part whatsoever, the breaking of one leg, and the bruising, fracturing and dislocating of other parts of his body, to his great and permanent injury, in the loss of time, medical services and mental and bodily suffering, to the damage of the plaintiff in the sum of \$—— and costs.

Wherefore the plaintiff prays judgment against the defendants and each of them in the sum of \$—— and costs.

B. & C.,

Attorneys for Plaintiff.

Sec. 913. Answer of company that employee was injured by his own negligence in disobeying rules.—

Defendant says that at the time the plaintiff was injured, and for a long time prior thereto, the plaintiff, as such employee of the defendant, had in his possession the time schedule issued by the defendant to all of its employees concerned in and about the movement and running of its trains and engines, which had been so issued and delivered to the plaintiff and all other such employees long prior to the time plaintiff was injured, and the same was fully known to and understood by him, so far as the same related to his duties as such locomotive engineer; that at said time, and for a long time prior thereto, the plaintiff also had in his possession the "Book of Rules and Regulations for the Government of Employees" of the defendant company, which provided rules and regulations for the direction and guidance

of all conductors, engineers and other employees of the defendant engaged in and about the movement, running and operating of all of its trains, cars and engines on all of the railroads operated by the defendant, and which rules and regulations were also known to and well understood by the plaintiff.

That by the express provisions and rules contained in said book of rules all engineers were charged, jointly with the conductors, with the safety of their trains, and responsible alike with such conductors for keeping their trains on time and for meeting and passing other trains as directed by the time-table and by general and special rules upon the time-table; and such engineers were not in any manner subject to any orders or directions of any conductor when such orders or directions conflicted with any general or special rule of defendant prescribed in said book of rules and regulations or prescribed by general or special rule or direction upon such time-table.

It was also provided by said book of rules and regulations that it was the duty of every engineer to carefully inform himself as to what train or trains were due or to be met upon the railroad before starting or moving his train; and that he must not consent to start with any train or engine until he had all information regarding other trains which was necessary to the safety of his own. Such engineers were also required by such rules and regulations to have in their possession said book of rules and said time schedule, containing the running time for all trains to which time was given, and to keep themselves familiar with said rules and regulations, and with the rules upon such time-table, by frequent reading, so as to be prepared to act in any emergency.

That upon the time-table in force at the time the plaintiff was injured, and which had been so in force from and after the — day of —, 18—, which was also in the possession of the plaintiff from the time the same went into effect until he was injured, were the following printed special rules for his direction and guidance, and for the direction and guidance of all other employees of defendant in and about the movement of cars, trains and engines, to wit: [*Copy of provision of rule.*]

That by reason of said special rule it became and was the duty of the plaintiff, as such engineer, in and about the movement of his said engine No. —, on the morning of the day on which he was injured [*here state duty*]. Yet, notwithstanding the provisions of said general and special rules and said special directions of said time-table, and the duties of plaintiff in relation thereto, on the morning of the day on which plaintiff was injured he recklessly and negligently ran and moved his said engine out of the Y. yard onto the main track — being the same track on which train No. — must

approach said K. from said S.—long before said train No. — had actually arrived in said Y. yard, and recklessly and negligently ran and moved his said engine at a high and grossly negligent rate of speed, to wit, at the rate of from — miles per hour, in the direction of D., when he did not know and had not seen that said train No. — had arrived at Y., whereby his engine, at or about the place stated in the petition, and while said train No. — was approaching Y. on the same track, also at a high rate of speed, his said engine came into collision with said train No. —, whereby the plaintiff was injured and other employees of the defendant killed and injured.

And the defendant avers that all the injuries sustained by the plaintiff, at the time alleged, resulted directly from and by reason of his own gross and criminal negligence, in the manner aforesaid, and not by reason of any negligence or want of care on the part of the defendant in any respect whatever.

NOTE.—*L. S. & M. S. Ry. Co. v. Lindsay*, error to circuit court of Mahoning county, Ohio. Judgments of lower court in favor of petition affirmed. But the court, Gilmer, J., charged in substance that if the jury found that the plaintiff was injured by reason of violation of the rules of the company, that he was guilty of contributory negligence, and that he could not recover.

Duty as to rules.—A company is bound to only ordinary care in making rules, and to anticipate and guard against such accidents as may reasonably be foreseen. *Berrigan v. Railroad Co.*, 181 N. Y. 582.

CHAPTER 65.

NEGLIGENCE CAUSING PERSONAL INJURY, INCLUDING A DISCUSSION OF GENERAL QUESTIONS OF NEGLIGENCE RELATING TO VARIOUS RELATIONS OF PARTIES.

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| <p>Sec. 914. Actionable negligence.</p> <p>915. Negating contributory negligence.</p> <p>916. Negligence, how pleaded.</p> <p>917. Petition for injury from snow and ice falling from roof of building.</p> <p>918. Petition against lot-owner for injury occurring through neglect of independent contractor in failing to cover coal vaults in sidewalk in front of building.</p> <p>919. Petition for leaving hole uncovered on premises by reason whereof another fell into it.</p> <p>920. Petition against railroad company for failure to furnish suitable platform for boarding car, and for suddenly starting train.</p> <p>921. Petition for injuries by being run over in vehicle.</p> <p>922. Petition against contractor for leaving trench in street open and unguarded.</p> <p>923. Petition for injury to a person about to take passage, caused by negligently posting an incorrect notice of the arrival of a train, whereby the person injured was induced to cross the track when train ran upon him.</p> | <p>Sec. 924. Petition for injury to passenger by failing to give proper time to alight.</p> <p>925. Petition by passenger for injury sustained by being compelled to pass over another train to board the one desired.</p> <p>926. Petition for injury while attempting to rescue another from danger—Alleging negligence by running at unlawful rate of speed in violation of ordinance—Failure to blow whistle or sound bell at crossing.</p> <p>927. Petition by passenger for injury by leaping from car.</p> <p>928. Petition by express messenger against railroad company for injury from car becoming detached.</p> <p>929. Petition by postal clerk.</p> <p>930. Petition by person injured while crossing tracks in approaching depot to become a passenger.</p> <p>931. Petition for injury to person in vehicle at street crossing caused by negligent backing of train.</p> <p>932. Negligence—Defenses.</p> <p>933. Answer of company averring knowledge of movement of trains by plaintiff.</p> <p>934. Answer by company setting up bad health of plaintiff prior to injury.</p> |
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Sec. 914. Actionable negligence.— Actionable negligence is the neglect to use ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by reason of which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.¹ A person performing a lawful act is not responsible for an injury arising therefrom unless it be occasioned by his own negligence, carelessness or wantonness.² The rule is well settled that a plaintiff may recover even though his own negligence subjected him to the risk, if the defendant, after he became aware or ought to have become aware of the plaintiff's danger, failed to use ordinary care to avoid the injury.³ Failure of a telegraph company to transmit and deliver a message in proper form is *prima facie* negligence for which the company is liable.⁴ And so is an agricultural society liable in an action for damages by a person who, while attending a fair and occupying a seat in the grounds of such society, sustains an injury in consequence of the negligent construction of the seats.⁵

Carriers of passengers must exercise the greatest care for the safety of their passengers; and where an injury results to a passenger from a collision, a *prima facie* case of negligence arises, which the company must rebut by showing either that the injury did not result from its carelessness, or that the negligence of the defendant contributed thereto.⁶ If a contract for the carriage of passengers, made in another state, contains a stipulation relieving the carrier from an injury which is valid in the state where made, a right of action will not arise in a sister state whose laws would permit the action to be sustained, by reason of the fact that the parties are

¹ *Harriman v. Railway Co.*, 45 O. S. 20.

² *Titus v. Lewis*, 38 O. S. 304. No recovery can be had when plaintiff is guilty of contributory negligence. *Railroad Co. v. Terry*, 8 O. S. 570.

³ *Railroad Co. v. Kassen*, 49 O. S. 280; *Kerwhaker v. Railroad Co.*, 8 O. S. 172.

⁴ *Telegraph Co. v. Griswold*, 37 O. S. 301; *Bartlett v. Telegraph Co.*, 62

Me. 709; *Rittenhouse v. Telegraph Co.*, 44 N. Y. 265; *Tyler v. Telegraph Co.*, 60 Ill. 421; *Turner v. Telegraph Co.*, 41 Ia. 458.

⁵ *Dann v. Agricultural Society*, 46 O. S. 98.

⁶ *Railroad Co. v. Mowery*, 36 O. S. 418; *Curtis v. Railroad Co.*, 18 N. Y. 542; *Holbrook v. Railroad Co.*, 12 Kern. 236.

under the jurisdiction of such sister state.¹ In an action by a parent for an injury to a minor son for the recovery of the loss of service of such minor until he becomes of age, the petition should contain a special averment alleging loss of prospective service in order to warrant a recovery therefor.² The doctrine of imputed negligence does not prevail in Ohio.³ In an action for personal injury, to warrant a recovery for a physician's bill as an element of damages, it must be specially pleaded.⁴

Sec. 915. Negating contributory negligence.—The courts are not in accord upon the question of negating contributory negligence by the plaintiff. Some plant themselves on the broad ground that the plaintiff must in every instance aver that he was without fault.⁵ The rule most generally adopted is that it is not necessary that the plaintiff should allege that he was free from negligence, as it is a matter of defense. This, however, is confined to cases where the relation of the parties does not require or impose any duty on the person injured toward the one causing the injury, or otherwise, except to use ordinary care to avoid the injury.⁶ Where, however, the facts stated in a petition show that the plaintiff sustains a relation to the defendant such as would suggest the implication of

¹ Knowlton v. Railway Co., 19 O. S. 260.

² Cincinnati Omnibus Co. v. Kuhn-ell, 11 W. L. B. 189, citing 1 E. D. Smith, 52; Thompson on Neg. 1250; Shearman & Redfield on Neg. 608; 2 Nash's Pldg. 997; 1 Bates' Pldg. 148; 78 Ind. 252.

³ Railroad Co. v. Manson, 30 O. S. 451; Street Ry. Co. v. Eddy, 43 O. S. 91; Transfer Co. v. Kelly, 36 O. S. 86.

⁴ Railway Co. v. Zepperlein, 1 O. C. C. 36.

⁵ Railroad Co. v. Peters, 80 Ind. 168. In Indiana the decisions upon this point are so numerous that one case will serve as an illustration. See Shearman & Redf. on Neg., secs. 48, 44, and cases cited; Railway Co. v. Winkle, 33 Ind. 639; Baker v. Baumgartner, 5 Ind. App. 576; Phoenix

Ins. Co. v. Pennsylvania Co., 33 N. E. Rep. 970.

⁶ Street R. R. Co. v. Nolthenius, 40 O. S. 376-80; Robinson v. Gary, 28 O. S. 241; Voss v. Young, 10 W. L. B. 292; Eskridge v. Lewis, 32 Pac. Rep. 1104 (Kan., 1898). The averment of defendant's negligence includes the want of contributory negligence. Lee v. Gas Light Co., 94 Ind. 115. The exercise of ordinary care is to be presumed from the natural order of things. Shearman & Redf. on Neg., secs. 43, 44. It need not be affirmatively alleged. Hudson v. Railway Co., 101 Mo. 18; Mele v. Canal Co., 14 N. Y. S. 630; Boyd v. Oddons, 97 Cal. 519; 32 Pac. Rep. 569 (1893); Robinson v. Railroad Co., 48 Cal. 409; McGhee v. Railroad Co., 78 Cal. 430; 21 Pac. Rep. 114; Conroy v. Construction Co., 23 Fed. Rep. 71.

negligence, as agent or employee, then he must negative that implication by an averment that he was without fault, to make a *prima facie* case.¹ Even though the plaintiff is not an agent or employee of the one causing the injury, cases may arise where a statement of the facts will show *prima facie* that he was the proximate cause of the injury, in which event he should plead that he exercised due care to avoid the injury.²

In all cases, therefore, by a servant against his master, or agent against his principal, or where the statement of facts presumptively shows contributory negligence, the plaintiff must allege that he was without fault.

Sec. 916. Negligence, how pleaded.—In all of the works examined, the writers have uniformly laid down the rule that in pleading negligence a general allegation is sufficient, and this view is entertained by some courts. It is said by those adopting this view that negligence is a conclusion of fact and not of law.³ The term “general allegation of negligence” is too broad. The facts necessary to describe the particular act complained of must of necessity be particularly

¹ *Railroad Co. v. Barber*, 5 O. S. 541; *Street R. R. Co. v. Nolthenius*, *supra*; *Cincinnati St. Ry. Co. v. Fullbright*, 7 W. L. B. 187. Where the evidence of the plaintiff raises a presumption of negligence, he must remove the presumption before he can recover. *Railroad Co. v. Whitacre*, 35 O. S. 627; *Hays v. Gallagher*, 72 Pa. St. 140; *Robinson v. Gary*, 28 O. S. 241. See *Coursel v. Railroad Co.*, 6 W. L. B. 190; *Hoth v. Peters*, 55 Wis. 405.

² *Hoth v. Peters*, 55 Wis. 405; *Railroad Co. v. Barber*, *supra*; *Robinson v. Gary*, *supra*; *Railroad Co. v. Whitacre*, *supra*. The distinctions pointed out in this section are not observed in practice, as almost every practitioner alleges in every case that the plaintiff was without fault. In the forms given, the usual allegations that it was without fault, are, when thought unnecessary, inclosed in brackets, indicating that the same may or may not be used.

³ *Bliss on Code Pldg.*, sec. 211a, citing *Railroad Co. v. Woffe*, 80 Ky. 84; *Grinde v. Railroad Co.*, 43 Ia. 376; *Oldfield v. Railroad Co.*, 14 N. Y. 310, adding that certain Missouri cases seem to require the facts constituting negligence to be stated; *Buffington v. Railroad Co.*, 64 Mo. 246; *Waldbier v. Railroad Co.*, 71 Mo. 514; *Edens v. Same*, 72 Mo. 212. See, also, *Bliss on Code Pldg.*, sec. 174; *Mack v. Railroad Co.*, 77 Mo. 283; *McCauley v. Davidson*, 10 Minn. 418; *Clark v. Railway Co.*, 8 Colo. 348; *Otto v. Railroad Co.*, 12 Mo. App. 168; *Meyer v. Railroad Co.*, 64 Mo. 542; *Ware v. Gay*, 11 Pick. 106.

Maxwell on Code Pldg., sec. 251, states that negligence is a qualifying word showing the manner in which the act was done, and is an issuable fact. Citing Missouri cases *supra*. See *Boone on Code Pldg.*, sec. 174.

Although it is necessary to state wherein the negligence consisted,

set forth, and in doing so it may be stated that it was negligently done, and the expression "general allegation of negligence" is used to characterize the facts which constitute the negligence. To state, therefore, that a general allegation of negligence is sufficient is certainly misleading. If construed and followed strictly, a general allegation of negligence does not charge any fact,¹ and the pleading undoubtedly would be subject to a motion to make definite and certain.² It is not necessary to state all the facts which contribute to the primary act complained of, or which tend to establish the negligence of such act. An allegation that the defendant negligently committed the particular act which led to the injury furnishes the predicate for the proof of all such incidental facts and circumstances, both of omission and commission, as fairly tend to establish the negligence of the primary act complained of.³ "The general rule is that allegations which adequately state the facts of negligence are sufficient to constitute a good pleading. An allegation specifying the act, the doing of which caused the injury, and averring generally that it was negligently done, states a cause of action, although it be not apparent from the complaint how the injury resulted from the negligence alleged."⁴ In any event it will be conceded that a general averment is good only as against a demurrer, and this is the doctrine maintained by an apparent weight of authority.⁵ A petition may be good as against a demurrer if it contains the substantial elements of a cause of action, however indefinitely they may be stated, as it will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment.⁶

this may be done in general terms. *Wills v. Railroad Co.*, 44 Mo. App. 51; *Palmer v. Railroad Co.*, 76 Mo. 217. A general averment of negligence, however, without stating wherein it consisted, is fatal. *Waldhiser v. Railroad Co.*, 71 Mo. 514; *Current v. Railroad Co.*, 86 Mo. 62.

¹ *McPherson v. Pacific Bridge Co.*, 20 Oreg. 486; 26 Pac. Rep. 560 (1891); *Woodward v. Railroad Co.*, 18 Oreg. 289.

² *Valley & F. I. Works v. Cullan*, 9 O. C. C. 217, 221; *Railroad Co. v. O'Neil*, 49 Kan. 367; *Railroad Co. v. Chester*, 57 Ind. 297; *Jones v. White*, 90 Ind. 255.

³ *Davis v. Guarnieri*, 45 O. S. 470; *Ware v. Gay*, 11 Pick. 106; *McCaulley v. Davidson*, 10 Minn. 418; *Grinde v. Railroad Co.*, 42 Ia. 376; *Railroad Co. v. Keeley*, 23 Ind. 133; *Meek v. Penn. Co.*, 38 O. S. 632; 2 *Bates on Pldg.* 615. Compare *Woodward v. Railroad Co.*, 18 Oreg. 289, and cases reviewed, as to variance.

⁴ *Spear, J.*, in *L. E. & W. R. R. Co. v. Mackay*, 53 O. S. 370, 382, citing *Boone's Pl.*, sec. 174; *Bliss' Pl.*, sec. 211a; *Maxwell's Pl.*, sec. 251; *Gulf, etc., R. R. Co. v. Washington*, 49 Fed. 347; *Rushville v. Adams*, 107 Ind. 475.

⁵ *Valley & F. I. Works v. Cullan*, 9 O. C. C. 217, 221; *Gulf, etc., R. R. Co. v. Washington*, 49 Fed. Rep. 347; *Harper v. Railroad Co.*, 36 Fed. Rep. 102; *Railroad Co. v. Crenshaw*, 65 Ala. 566; *Anderson v. East*, 117 Ind. 126; 18 N. E. Rep. 726; *Scott v. Hogan*, 72 Ia. 614; 34 N. W. Rep. 444; *McFadden v. Railway Co.*, 92 Mo. 343; *Railway Co. v. Wynant*, 100 Ind. 160; *Mining Co. v. Patton*, 129 Ind. 472; *Deller v. Hofferburth*, 127 Ind. 414; *Rushville v. Thimes*, 107 Ind. 475; *Railroad Co. v. O'Neil*, 49 Kan. 367; *Jones v. White*, 90 Ind. 255.

⁶ *Railroad Co. v. Washington*, 49 Fed. Rep. 349; *Fordyce v. Merrill*, 49

This question must be considered in another light. Negligence cannot be alleged without setting forth the acts and omissions of the defendant upon which the right to recovery is based, and then showing by appropriate averments that they occurred through the negligence of the defendant. The rule that facts constituting the cause of action must be stated plainly and concisely is fundamental, and applies in all its force to allegations of negligence.¹ The petition should show to which servant or servants of the defendant negligence is imputed, and state fully and definitely what acts or omissions of such servants constitute the negligence complained of.² The petition must also show a legal duty or obligation imposed on the defendant toward the person injured, existing at the time and place of the injury, which the defendant failed to perform, by reason of which the injury was occasioned.³ It is not sufficient to allege that a duty existed, and that the defendant violated it, but all the facts showing the duty should be stated.⁴ An averment that plaintiff was in the car of the defendant and was thrown therefrom by the carelessness and negligence of the defendant is too general.⁵ And so an averment in a petition for injuries sustained by stepping through a walk which was out of repair, that "then and there, and long prior thereto, it had been the duty of said defendant to keep the sidewalk in safe condition," is not an allegation of fact, but a conclusion of law.⁶ But a petition which alleges that the plaintiff, while a passenger on a street-car, was thrown under the wheels of the car by gross carelessness and negligence of the employees in charge of the car, has been held to be a sufficient allegation to show negligence.⁷

Ark. 277; 5 S. W. Rep. 829; Green v. 132; Evansville R. R. Co. v. Griffin, Mayer, 8 Abb. Pr. 27. The acts may 100 Ind. 221; 50 Am. Rep. 783; be set out with a reasonable degree of Sweeney v. Railway Co., 10 Allen, particularity and then allege that 368. See, also, Black's P. & P., sec. they were negligently done. Ginley 138.

v. Railroad Co., 98 Mo. 445; Sullivan 4 Angus v. Lee, 40 Ill. App. 304
v. Railroad Co., 97 Mo. 118-17. See Clark v. Dyer, 81 Tex. 339-345.

¹ Woodward v. Railroad Co., 18 5 Railroad Co. v. Van Horn, 38 N. J.
Oreg. 289; Field v. Railroad Co., 76 L. 133.

Mo. 614; Thomas v. Railroad Co., 40 6 Sammins v. Wilhelm, 6 O. C. C.
Ga. 231. 565.

² Railway Co. v. O'Neil, 49 Kan. 367. 7 Richmond v. Second Ave. R. Co.,

³ Thiele v. McManus, 3 Ind. App. 19 N. Y. S. 597.

Sec. 917. Petition for injury from snow and ice falling from roof of building.—

[Caption and formal averment.]

On the — day of —, 18—, defendant was the owner and in possession of certain premises located at No. —, M. street, in the city of —, in said county and state. That defendant has erected thereon a building in such a manner that the roof thereof projects over the sidewalk running along said building, so that snow and ice will fall therefrom upon the sidewalk, which said sidewalk is used by the general traveling public.

That on or about —, 18—, the roof of defendant's said building was covered with snow and ice, which the defendant negligently permitted to remain there, and did not take any precaution to prevent said snow and ice from falling upon the sidewalk or to protect those who passed his said building.

That on the — day of —, 18—, plaintiff was passing along the sidewalk in front of said defendant's said building, when, by reason of the failure and neglect of said defendant to properly remove said snow and ice so that the same would not fall upon and injure foot-travelers upon said sidewalk, a large quantity of the said snow and ice so as aforesaid upon the roof of said defendant's building fell therefrom upon the sidewalk where plaintiff was passing, striking plaintiff and injuring him. *[State nature of injuries.]*

[Prayer.]

NOTE.—Founded on *Smethurst v. Church*, 148 Mass. 261. A traveler has the same right to enjoy the use of the highway undisturbed as if he were the owner in fee-simple. *Shipley v. Fifty Associates*, 101 Mass. 251; *S. C.*, 106 Mass. 194. So the owner of a building, the roof of which projects so that snow and ice will in the ordinary course of things fall upon persons in the highway, is liable without proof of further negligence to a person injured thereby. *Smethurst v. Church*, 148 Mass. 261. But the owner has been held not liable where he has let the premises to a tenant. *Clifford v. Cotton Mills*, 146 Mass. 47. If the nuisance exists, however, at the time the premises are let, the landlord can be held, although the tenant may also be liable to the person injured. *Daloy v. Savage*, 145 Mass. 33, 41; *Swords v. Edgar*, 59 N. Y. 28; *Joyce v. Martin*, 15 R. I. 558. The liability will stop with the tenant whose intervening wrong is the immediate cause of the damage. *Mellen v. Morrill*, 126 Mass. 545; *Edwards v. Railroad Co.*, 98 N. Y. 245.

Sec. 918. Petition against lot-owner for injury occurring through neglect of independent contractor in failing to cover coal vaults in sidewalk in front of building.—

[Caption.]

The plaintiff says that on the — day of —, 18—, the defendants were the owners of a leasehold estate of and in certain real property on — street, in the city of —, and were then in the possession of said property, erecting and had then nearly completed thereon a business block. That said

building was being made to front on said — street for a distance of some — feet. That said street is a common thoroughfare, and that there is a large amount of travel upon the same, and upon the sidewalk along the same, and directly in front of said building. That said defendants took up and removed said sidewalk in front of said premises, and built therein coal vaults and a private passage-way, and then relaid said sidewalk in part, leaving openings therein some twelve feet long and four feet wide and some nine or ten feet deep.

That while said passage-way and vaults were being constructed by said defendants they kept said place well protected by a fence, but after said walk had been replaced in part, and said openings remaining, said defendants took away said fence, covered said openings over with old and loose boards entirely insufficient to protect and make safe public travel upon said sidewalk, and said places were left by said defendants without proper protection, and without any light or signal to indicate danger. And on the night of the day aforesaid said sidewalk was left by said defendants in said unsafe and dangerous condition.

That the plaintiff on the night aforesaid was lawfully traveling on and along said sidewalk, and was wholly unaware of danger, [and without fault or negligence on his part] he stepped upon one of the boards covering said openings, when the same gave way and precipitated him into said excavation, whereby he received great bodily injuries, and was made sick and sore. His ankle was dislocated, his leg broken and the bone driven through the flesh, lacerating, bruising and tearing the same. That he was kept thereby to his bed and detained from his business for nine months or more, and was compelled to expend in consequence thereof \$—— for medical attendance and \$—— for nursing. That his said limb is not yet well and never will be, and said ankle-joint is permanently stiff. That he has by reason of his said injuries suffered and still suffers intense pain. Whereby plaintiff says that he has been damaged to the amount of \$——.

Wherefore plaintiff prays that he may have judgment against the defendants for the sum of \$——.

NOTE.— From *Hawver v. Whalen*, 49 O. S. 69, in which it was held that an owner of a city lot who is erecting a building, who makes excavations in the sidewalk for coal vaults, and leaves the same unprotected, is liable in damages to a person who is injured by reason of failure to keep the same guarded, even though it be caused by a contractor who has the work in charge.

Sec. 919. Petition for leaving hole uncovered on premises by reason whereof another fell into it.—

[*Caption and formal averments.*]

Defendant is, and was on the — day of —, 18—, the owner and in possession of certain premises known as —,

and situated in — county, Ohio, which said premises were located along a certain public highway. That from and after the — day of —, 18—, there was a certain hole which opened into a cellar belonging to and a part of said premises of said defendant. That said defendant failed and neglected to place any covering or protection over said hole, but wilfully and negligently permitted the same to be and remain open for a long period. That by reason of said defendant's carelessness and negligence in so failing to provide a covering for said hole, plaintiff did on the — day of —, 18—, while lawfully passing along said highway in the night-time of said day, fall into said hole, thereby breaking his leg, etc. [*Describe injuries and allege special damages.*]

[*Prayer.*]

NOTE.— The owner of land is liable, to those coming upon it at his invitation on business, for an injury caused by the unsafe condition of the land or access thereto. *Pierce v. Whitcomb*, 48 Vt. 127; s. c., 21 Am. Rep. 120; *Carlton v. Iron Co.*, 99 Mass. 216; *Beck v. Carter*, 68 N. Y. 283; s. c., 24 Am. Rep. 175. An excavation immediately adjoining a foot-way is a public nuisance, for which the owner of the premises is liable. *Barnes v. Ward*, 67 E. C. L. 392. But if a person of his own motion deviates from the highway, or goes into places of danger, he assumes the risk, and the owner is not responsible. *Beck v. Carter*, *supra*; *Sweeney v. Railroad Co.*, 10 Allen, 368; *Elliot v. Perry*, 10 Allen, 385; *Sawyer v. Railroad Co.*, 27 Vt. 870. The true test of legal liability is whether or not the excavation be substantially adjoining the way. *Barnes v. Ward*, 9 C. B. 392; s. c., 67 E. C. L. 392.

Sec. 920. Petition against railroad company for failure to furnish suitable platform for boarding car, and for suddenly starting train.—

Plaintiff says that the defendant is an association of persons duly incorporated under the laws of the state of P., but not incorporated under the laws of Ohio. That on the — day of —, 18—, the defendant was in the occupancy of and operating the — railroad, and line of road, running from —, Ohio, to —, Pennsylvania, and was engaged in the business of carrying passengers over the same for hire and reward. That on the — day of — of that year she became and was a passenger, at the special instance and request of the defendant, upon said road, to be carried from the station at — to the said — for a certain reward paid to the defendant; that the defendant thereby promised and agreed to carry her safely from said — to —, and was bound thereby to furnish her suitable and proper means whereby she could safely enter the car of the defendant, and was bound to stop its train a sufficient length of time to enable her to get upon the same. That at the station where this plaintiff was compelled to enter the train, the said defendant had not furnished any platform or any depot for the accommodation of the passengers who were in the habit of boarding this train at that point; that the ground was from three to four feet below

the lowest step on the car and thus impeded ingress to the car, and that the company had supplied no conveniences for persons desiring to take passage at that point, and that as she was about to get upon the car the conductor of the defendant gave her such slight assistance in climbing up, and so carelessly assisted her, that on getting on the steps of the car she was thrown around on the side of the car, and through the haste of the defendant in starting the train she was bruised, strained and injured in her back and spine, and by reason thereof has permanently lost the use of her lower limbs, etc.

Wherefore she prays judgment, etc.

NOTE.—From *Pennsylvania Railroad Co. v. Peoples*, 81 O. S. 537. See *Pennsylvania Co. v. Marion*, 128 Ind. 415; *Lucas v. Pennsylvania Co.*, 120 Ind. 205. The company must provide safe means of access to and from its stations, and passengers have a right to assume that the means provided are reasonably safe. *Railroad Co. v. Trautwein*, 52 N. J. L. 169.

Sec. 921. Petition for injuries by being run over in vehicle.—

That on the — day of —, 18—, the plaintiff was lawfully in possession of a carriage, to wit, a —, and a horse drawing the same, in which carriage the plaintiff was driving along a public highway, and the defendant was then in possession of a certain carriage, and a span of horses then under his control drawing the same on said highway.

That the defendant did so carelessly and negligently manage and direct his horses and carriage that they struck the horse and carriage in which plaintiff was riding with such great force and violence that it threw plaintiff with great force and violence out of his said carriage upon the ground, and [*state injuries and damages sustained*].

[*Prayer.*]

Sec. 922. Petition against contractor for leaving trench in street open and unguarded.—

[*Caption and formal averments.*]

That on the — day of —, 18—, — street, in the city of —, in — county, was and still is a common highway.

That on said day the defendant entered into a contract with the proper authorities to lay down a certain water [*or, gas*] pipe therein. That it was the duty of said defendant to keep said street in a reasonably secure condition while performing said labor, and thereupon the defendant dug a trench in said street about — feet in width and — feet deep for the reception of said pipe, and wrongfully left the same open during the night-time without any guard, light or signal to indicate the existence of such trench, and without any proper precautions against accident.

That on the — day of —, 18—, the plaintiff, while lawfully driving along said street in the night-time, without any warning or knowledge of the existence of said trench, drove into said trench, and his carriage was overturned and broken [*state the personal injury*].

[*State damages.*]

Sec. 923. Petition for injury to a person about to take passage caused by negligently posting an incorrect notice of the arrival of a train, whereby the person injured was induced to cross the track when train ran upon him.—

Defendant is a corporation, duly organized under the laws of the state of Ohio, and on the — day of —, 18—, owned and occupied a certain railroad, known as the — Railway, with tracks, cars, locomotives and appurtenances thereto belonging. At and for a long time prior to said date said company was accustomed to and did publish notices upon a bulletin board, placed by the defendant for that purpose in its passenger depot at N. station in said county, informing the public whether expected and approaching trains upon said railroad would arrive at said station “on time,” that is to say, at the precise time appointed for the arrival of said trains as stated on the printed and published time-tables of said company, or whether said trains would arrive “behind time,” and if so, how many minutes, that is to say, how many minutes after said appointed times said trains would arrive; and the public, including the plaintiff, were accustomed to and did rely upon said notices on said bulletin boards as correct.

On said day defendant, having the means of knowing that the train from the east hereinafter mentioned was approaching said station and would arrive thereat “on time,” or nearly so, that is to say, at or near the time appointed for the arrival of said train as stated on said printed and published time-tables, wrongfully and negligently caused a false and incorrect notice to be placed on said bulletin board, announcing to the public that said train would arrive at said station — minutes “behind time,” that is to say, — minutes after the time appointed for its arrival as aforesaid; which notice the plaintiff then, before the arrival of said train, read, believed to be correct, and relied upon; whereas, said train did in fact arrive at said station on time or nearly so, and not — minutes behind time.

That on said day and just before the arrival of said train at said station upon a track of said railroad next to the passenger depot platform, the defendant caused another train, arriving from the west at said station and eastward-bound, to be run upon a track next beyond the one hereinbefore mentioned from said depot platform, so that it became and was neces-

sary for passengers to cross the first-mentioned track in passing from said platform to said eastward-bound train.

That he had bought and procured of the defendant a ticket as a passenger on its trains to and from C., the station on said railroad next east of said N., and at the time of the occurrences hereinafter stated was crossing said track nearest to said platform, from said platform, for the purpose of taking passage on said eastward-bound train for said C.

That on said day there were street and highway crossings over and upon said railroad at both the eastern and western ends of said depot, and that no signals, by bell or whistle or otherwise, were given of the approach of said train from the east as required by law, but the same were by the defendant negligently and unlawfully omitted; and the defendant, at said time while the plaintiff was lawfully crossing its said track for the purpose aforesaid, caused its said train from the east to be hidden and obscured from the view of the plaintiff, by its trucks loaded with baggage and other obstructions to the view, and caused said train from the east to be run at a reckless and negligent rate of speed, and so negligently managed and conducted its said train from the east, consisting of a locomotive and cars, that the plaintiff, by reason of said negligent and unlawful acts and omissions of the defendant [and without any fault or negligence on his part], was violently struck and run upon by said train from the east, whereby [*state injuries and damages*], to his damage — dollars, for which he asks judgment.

NOTE—From *L. S. & M. S. Ry. Co. v. Herrick*, 49 O. S. 25.

Sec. 924. Petition for injury to passenger by failing to give proper time to alight.—

[*Averment of corporate character.*]

That on the — day of —, 18—, the said defendant owned and used a certain line of railroad leading from the city of C. to the city of T., all within said state of Ohio.

That on the said — day of —, 18—, said defendant was the owner of certain trains, cars and locomotives running upon said railroad, and was thereby engaged in the business of common carrier of passengers and their baggage upon its said line of railroad.

That on the said — day of —, 18—, the said plaintiff was properly a passenger with her baggage on one of the trains and cars of said defendant, going from U. S. station southward to F. station on said railroad, and all within said county; and upon the arrival of said train and cars at said F. station defendant undertook through its agents and servants to so carefully, skilfully, prudently and properly manage and control said train and cars as to enable and allow said plaintiff to then and there safely alight therefrom.

That said defendant by its said agents and servants so carelessly, negligently, unskilfully and improperly managed and controlled said train and cars that said plaintiff was not allowed proper and reasonable time, attention and opportunity to safely alight therefrom at said F. station; and by reason of said careless, negligent, unskilful and improper management and control of said train and cars, the said plaintiff [without fault or want of proper care on her part] was violently thrown therefrom upon the frozen ground in the night season at said F. station, and then and there so left by the defendant severely wounded, insensible and uncared for.

That by reason of being so thrown from said train as aforesaid, plaintiff was thereby wounded, bruised and severely injured upon her head, face, arms, shoulders, and other bodily injuries and wrongs were then and there and thereby inflicted upon said plaintiff, by reason whereof she was compelled to employ a physician and surgeon and nurses and attendants to wait upon her while she was confined to her bed and disabled from waiting upon herself by reason of said injuries and to pay large sums of money therefor, to wit: For said medical and surgical attention and medicines the sum of \$—; for said nurses and attendants, the sum of \$—; and plaintiff was further compelled to endure by reason of said wrongs and injuries great mental anguish and bodily suffering, and injured health and impaired usefulness and loss of time and inability to labor, by reason of all which plaintiff says she has been damaged to the amount of — dollars.

Wherefore plaintiff prays judgment against the said defendant for the said sum of — dollars, her damages so as aforesaid sustained.

A. S. and G. & C., Attorneys.

NOTE.—From *C. & T. Ry. Co. v. Newell*, error to circuit court of Wyandotte county, Ohio, Supreme Court, unreported, No. 1313, in which the court, Price, J., charged the jury that it was the duty of the servants of the defendant to stop long enough to allow all passengers to have reasonable time and opportunity to alight, and that if it did not stop a sufficient length of time to allow a passenger to alight, it would be such negligence as would make the company liable, unless the party injured was guilty of contributory negligence. Judgments of lower courts reversed, but only because there was no evidence of negligence on part of the company.

Damages.—Expenses incurred for medical attention, the character of the injury, temporary or permanent, the effect on the ability to earn money and physical or mental suffering may be considered. *Indianapolis v. Gaston*, 58 Ind. 224; *Indiana Car Co. v. Parker*, 100 Ind. 195, and cases cited; *Shearman & Redf. on Neg.*, sec. 606.

Sec. 925. Petition by passenger for injury sustained by being compelled to pass over another train to board the one desired.—

[*Caption and averment of corporate capacity.*]

On the — day of —, 18—, in consideration of \$— paid defendant by the plaintiff, it received the plaintiff as a passenger on said — Railway Company's road, at its depot at

said A., to be carried from said A. to said C., and the defendant was and thereby became bound to furnish plaintiff suitable means and time to enter defendant's passenger car; but the plaintiff avers that said defendant, before the arrival of the east-bound train upon which plaintiff was to ride, and did finally ride upon to said C., drew up on its track nearest to and directly in front of said defendant's passenger depot at said A., a long train of defendant's passenger cars, baggage cars and other cars, to which was attached a locomotive and tender, which entire train was by defendant then and there stopped and then and there so remained for a long time, to wit, for the space of — minutes, which said last-mentioned train was bound west, and extended both east and west of said depot and the platform thereof.

That while said last-mentioned train was so standing and remaining, with its locomotive and all its several cars closely attached together by means of the coupling of the same, the defendant's passenger train, for which the plaintiff had purchased her said ticket and upon which she was to be carried to said C. by said defendant, arrived from the west at said A. passenger depot, and was drawn down in front of said depot upon one of the tracks of defendant north of the track occupied by the said west-bound passenger train, and parallel therewith. That immediately or soon after the arrival as aforesaid of said east-bound train the defendant or its agents gave notice that all passengers going east on said east-bound train must get on board of said east-bound train, as the same was about to leave said depot, and the defendant did not divide said west-bound train, nor did it in any way or manner assist or help the plaintiff to go upon said east-bound train, nor did defendant provide a safe passage-way for the plaintiff from its said depot to said east-bound train, but, on the contrary, the defendant carelessly and negligently permitted the said west-bound train to remain undivided in front of said depot, and between said depot and said east-bound train, and the plaintiff, who at that time was — years of age and somewhat unused to traveling upon railroads, was then and there, by the carelessness and negligence of the defendant, compelled to clamber upon and over said west-bound train to reach said east-bound train before its departure from said depot, there being no other way for plaintiff to reach said east-bound train before its departure; and that while said plaintiff was so upon said west-bound train, and just as she was alighting therefrom, in attempting to board said east-bound train, the defendant negligently and carelessly, without giving plaintiff any notice of its intention so to move said train, started said west-bound train suddenly, and thereby [*here state how plaintiff was injured*].

That the defendant, by its agents and servants, negligently

and carelessly neglected and refused to assist plaintiff at any time or in any manner in getting upon, or crossing, or getting over or off said west-bound train, or in boarding said east-bound train thereafter. That said east-bound train moved out from said depot the moment that plaintiff got upon the steps of one of the passenger cars, and before she could or did have time to go inside of said car. That by reason of the negligence and carelessness of the defendant in requiring the plaintiff to cross over said west-bound train and in neglecting and refusing to aid and assist her in going over the same, and in negligently and carelessly starting said train while the plaintiff was so upon the same, and in neglecting and refusing to aid and assist the plaintiff in alighting therefrom, the plaintiff was negligently, carelessly, violently and forcibly thrown from the step of one of said cars upon the north side thereof to the ground, with great force. [*State nature of accident.*] And said defendant negligently and carelessly started said car on said west-bound train before plaintiff had reasonable opportunity to get off from the same, and in consequence of the negligence and carelessness of said defendant, and while the plaintiff was in the exercise of ordinary care and prudence, and without fault on her part, she was so as aforesaid negligently, carelessly, violently and forcibly thrown from said car. [*Here state the nature of the injury.*] And she has sustained damages by reason of the premises in the sum of — dollars, for which sum she prays judgment against said defendant.

NOTE.—From *L. S. & M. S. Ry. Co. v. Lewis*, error to circuit court of Mahoning county, Ohio, Supreme Court, unreported, No. 2166 (13874). Judgment of lower courts sustaining complainant affirmed by supreme court.

Sec. 926. Petition for injury while attempting to rescue another from danger — Alleging negligence by running at unlawful rate of speed in violation of ordinance — Failure to blow whistle or sound bell at crossing.—

[*Caption and averment of corporate character.*]

At the date of the grievance hereinafter complained of defendant was operating a railroad with cars propelled by steam power over and along the line of railroad known as the “—— Railroad,” extending from the company’s depot, upon the northwesterly side of M. river, at the foot of M. and C. streets, in the city of T. in said county, to the village of W., in said state, as part of a line of railroad between T., Ohio, and P., Pa.

That at the said date, B. street, in said city of T., was a duly dedicated, appropriated, improved and traveled street in said city of T., and in conjunction with C. street and the bridge known as the “—— bridge,” across the M. river at said place, was a continuous, popular and generally traveled thoroughfare of said city of T., so that at said date, and for a

long time prior thereto, there was upon every business day an almost continuous line of teams passing along the roadway of said B. street; and along the sidewalk bordering on said street an almost continuous concourse of people passing upon foot.

That at said date the defendant's said railroad track crossed said B. street at grade. That on the — day of —, 18—, there was, at the junction of said railway and said B. street, no sign or other device to warn the public of danger at said crossing by passage of locomotives drawing and conveying cars over and along said track and across said street.

That the city council of said city had duly provided by ordinance that no locomotive engine should, by its agent, engineer, conductor or other employee, be allowed or caused to cross or enter upon any public street or highway where travel is upon the grade of the railroad track, within the limits of said city, at a greater rate of speed than — miles an hour.

Said plaintiff further avers that said defendant had assumed to provide a proper gate at said crossing, but that at said date and at the time of the grievance hereinafter complained of, namely, at or about the hour of — P. M. of said day, said gate was not closed so as to shut off said travel across said track on said highway, and there was no watchman or person in charge of said gate in attendance to prevent persons then traveling on said street from crossing said railroad track upon said street, by keeping said gates closed or otherwise, when trains of cars were approaching in either direction, or by warning persons to keep off of said track at such crossing when trains were approaching.

On said — day of —, 18—, an engine drawing a train of freight cars, which engine and train was then being moved by the defendant over and along said railroad track at an unlawful rate of speed, to wit, at the rate of from — to — miles an hour, without signaling its approach by sounding the whistle or ringing the bell, or giving any warning or notice of its approach to said crossing, swiftly rushed and passed along said track and across said street at said crossing. That there were at that part of said street where said railroad crossed the same, at said date, obstructions which prevented any person approaching said track from the east, along the southerly side of the street, from seeing any train upon said railroad track which approached said street from the southwest, until said person was upon or near to said track. That at the date and about the hour aforesaid, said plaintiff was rapidly walking on the said sidewalk, on the southerly side of the street, and approaching said railroad; and when close to said railroad track he saw a child of tender years thereon, whose name, as he was informed, was L. C., and hearing from persons standing by that there was danger to the life of said

child from an approaching train, he ran forward, onto said track from said sidewalk, crossing the same, and with his back to said approaching train, to take said child from said track to save its life; and, having taken said child, with one foot inside the rail of said railroad track and the other outside, the said railroad company having, as aforesaid, failed to have any person in attendance to shut down and close said gate to intercept passage of persons on foot or in vehicles across said track and on said street; having failed also to sound the whistle or ring the bell of said locomotive when approaching said crossing, ran said locomotive with said cars attached against said plaintiff, and with said child in his arms, and without fault or negligence on his part, with the pilot or "cow-catcher," so called, of said locomotive struck the body of said plaintiff, and [*state how injury occurred*].

The plaintiff further avers that by reason of said wrongful act of said defendant [*state injuries*].

Wherefore said plaintiff says that he has sustained damage to the amount of \$——, for which, with costs of this action, he asks judgment against said defendant.

NOTE.—From *Pennsylvania Co. v. Langendorf*, 48 O. S. 816. It is not negligence *per se* to risk one's own safety in attempting to rescue another. And if one does not unnecessarily expose himself to danger, and is injured, the one who negligently exposed the person requiring assistance to danger is liable. *Id.*

Contributory negligence will not be imputed to a man who, under a sense of superior duty so instantaneous as to be unconscious of impending danger, attempts to rescue another from impending danger, when it is the want of ordinary care of the defendant that invokes the peril. *Railroad Co. v. Hanlon*, 53 Ala. 70; *Eckert v. Railway Co.*, 48 N. Y. 502; *Linnahan v. Sampson*, 126 Mass. 506; *Donahue v. Railway Co.*, 83 Mo. 560; *Wharton on Neg.*, sec. 814; *Beach on Contrib. Neg.*, sec. 15; *Carrol v. Railroad Co.*, 14 Minn. 57; *Pennsylvania Co. v. Roney*, 89 Ind. 458; *Cottrill v. Railway Co.*, 47 Wis. 684.

A person in attempting to rescue another from danger may assume a risk without being chargeable with a want of due care. *Buell v. Railroad Co.*, 81 N. Y. 814; *Pigott v. Lilly*, 55 Mich. 150; *Donahue v. Railroad Co.*, 83 Mo. 550. See *Spooner v. Railroad Co.*, 115 N. Y. 22; *Coulter v. Express Co.*, 56 N. Y. 585; *Buswell's Personal Injuries*, sec. 214.

• Sec. 927. Petition by passenger for injury by leaping from car.—

That said defendant is a corporation duly organized under the laws of the state of —, and is operating a railroad from — to —, and is a common carrier of passengers and freight or hire on said railroad.

That on the — day of —, 18—, and while the defendant was so operating said railroad, it received the plaintiff as a passenger in one of its passenger cars at —, and thereby undertook to convey him from said place to —, for the sum of \$—— paid by the plaintiff to the defendant.

That on said day, the defendant and its employees were so

negligent and careless in the managment of the car in which the plaintiff was so as aforesaid a passenger, that a collision was imminent with another locomotive and cars upon the track of said railroad [*state how*] and thereby, by reason of the negligence of said defendant and its employees, there was great danger that the plaintiff would be injured and maimed or his life destroyed, and in order to escape such danger he was compelled to jump from said car, and in so doing sustained injuries, without his fault, as follows: [*state in full*]; by reason of which the plaintiff was sick and lame for the space of — months, and unable to attend to his business, and expended for medical attendance the sum of \$—, in all to his damage in the sum of \$—.

Sec. 928. Petition by express messenger against railroad company for injury from car becoming detached.—

Plaintiff avers that the said defendant, on the — day of —, 18—, and prior thereto, and ever since, has been a corporation and common carrier, engaged in carrying passengers and freight from P., Pa., to the city of St. L., Mo., by railroad, and that the said defendant during said period of time had a contract with a corporation or company known as "The Adams Express Company," by which, for a stipulated price and period, the said defendant agreed to transfer and carry upon said railway of the said defendant, and in the cars thereof, express packages, and the express messengers in the employ of the said Adams Express Company having charge of said express packages.

Plaintiff avers that on or about the — day of —, 18—, he was in the employ of the said Adams Express Company as express messenger, and on the cars of the said defendant attending to the business of the Adams Express Company as such messenger, running from P., Pa., to C., Ohio, on the railway of the said defendant.

Said plaintiff says that while so engaged in the employment of the said Adams Express Company, as express messenger, and on the railway of the said defendant, the said defendant so carelessly and negligently and unskilfully managed and operated the running of its cars that afterwards, and while the said cars were proceeding from P. to C. on said railway, and while the said plaintiff was in the cars of the said defendant, and in the employ of the Adams Express Company as aforesaid, the said cars, by and through the defectiveness and insufficiency of the same, and of the construction and material thereof, and on account of the imperfection of the coupling, the draw-bars and the link used in connection therewith, the same broke and gave way, and the cars became detached and separated from the engines drawing the same, and that by and

through the carelessness, unskilfulness and improper conduct and default of the said defendant and the said defendants' officers, agents and servants in that behalf, and in the running, managing and conducting the cars and train, and the engines drawing the same, the engines became detached from the cars and separated as aforesaid, as the train was going down a steep, heavy and dangerous grade, thereby leaving the said plaintiff in the rear car, or express car, entirely detached and separated from the engines. That the car, or cars, so detached and separated from said engines, left the said plaintiff in the rear car, or express car, entirely unprotected, following the two engines at a rapid rate down said steep hill or heavy grade.

Plaintiff says that the air-brakes used in connection with and in operating the said cars and the engines attached thereto were defective, in bad order and bad condition, that they could not be worked or operated or used to any advantage, and that they were utterly unfit for the uses and purposes for which they were intended; and that the failure of the defendant to have proper air-brakes, in good order and good condition, and in proper working order, was gross and wilful negligence on behalf of the said defendant, its officers, agents and servants.

Plaintiff says that even after the said cars became detached from said engines, the cars so detached from said engines, including the express car in which the plaintiff was riding, could and would have been stopped by the officers and servants of said defendant in said rear cars so detached from said engine had the said air-brakes been in good order and good condition, and fit for the purposes for which they were intended in connection with the operating of said train.

Plaintiff avers that while occupying this dangerous and hazardous position in the car, going down this steep and dangerous grade, so detached from said engines, and fearing that he might meet with his death or sustain serious bodily injuries should he remain in said express company car, he leaped or jumped therefrom, in order to protect or save himself from what he believed, at the time, would be imminent death.

Said plaintiff avers that in leaping or jumping, or endeavoring to leap, from said car, and in his effort to save and protect himself from personal injuries or immediate death, he was thrown down an embankment, and upon the snow and ground beneath, thereby causing great damage to plaintiff [*describe injury*], and that he is still disabled from attending to his usual and ordinary business.

Plaintiff says that the injuries so received by him were caused and brought about by and through the gross and wilful carelessness and negligence of the said defendant, its

agents and servants, and from no fault, carelessness or neglect on his part.

Wherefore plaintiff prays judgment against said defendant in the sum of \$——.

J. & J.,

Attorneys for Plaintiff.

NOTE.—From *P. C. & St. L. Ry. Co. v. Hart*, Supreme Court, unreported, 25 W. L. B. 186, affirming judgments of circuit and common pleas courts of Hamilton county, in which recovery was had upon this petition.

A railway company owes the duty to carry express messengers safely as passengers, even though carried under contract with express company. *Blair v. Railroad Co.*, 66 N. Y. 818; *Yeomans v. Navigation Co.*, 44 Cal. 71; *Hammond v. Railroad Co.*, 6 Richardson, 180.

Sec. 929. Petition by postal clerk.—

[*Averment of corporate character, etc.*]

That on or about the —— day of ——, 18——, said defendant entered into a contract with the United States by which, for a stipulated consideration, said defendant agreed to transport, upon the cars of said railroad, the mail and postal clerks or mail agents of the United States upon said line.

That on the —— day of ——, 18——, and during the existence of said contract, the plaintiff was postal clerk or mail agent of the United States, and in the employ of the same on said line, and as such was received as a passenger in the cars of said defendant in pursuance of said contract, to be by said defendant safely and with due care carried therein from the said —— to ——.

That said defendant did not safely and with due care carry the plaintiff as such passenger, but the defendant, not regarding its duty in the premises, negligently and without proper care provided and permitted to be used on the car in which plaintiff was being conveyed [*describe defect*], which was defective and unsound, thereby rendering the car unfit for use and entirely unsafe for such purpose, of all which said defendant had or could have had, by proper care and inspection, due notice.

That while said car was proceeding from —— to ——, and while said plaintiff was such passenger therein, said car, through the defect in ——, and through the carelessness and want of proper care of said defendant, and without plaintiff's fault or neglect, was thrown from said railroad track and [*state specifically the injuries received*], whereby the plaintiff has, without his fault or neglect, sustained damages in the sum of \$——.

NOTE.—Some courts hold the railway company liable, for injuries to mail agents carried under contract, as passengers. *Nolton v. Railroad Co.*, 15 N. Y. 444; *Collett v. Railway Co.*, 16 Q. B. 984.

Sec. 930. Petition by person injured while crossing tracks in approaching depot to become a passenger.—

The said plaintiff avers that at the time of the commission of the grievances hereinafter alleged, and for a long time prior thereto, the said defendant was a body corporate under the laws of Ohio, and was the owner and in the control and management of a line of railroad running north and south through said county of —, and through the village of E., in said county, and had the control, management and direction of all the engines, cars and other rolling stock on said line of railroad in said county, and likewise had then and there management and control and direction of all servants, engineers and other employees on said line in said county.

The plaintiff further avers that on or about the — day of —, 18—, the plaintiff was a regular passenger on one of the trains of said defendant, and from his home in V., Ohio, to the said village of E., where he had business to transact, and had a return ticket from said village of E. to his home in said village of V., and with said ticket issued to him by the defendant intended to and did prepare, after transacting his business, to return to his home on a train of said defendant which carried passengers on said railroad between said points, and which train was due from the south at said E. about the hour of —, railroad or central time, P. M., of said day.

The plaintiff avers that at said station and village of E. the said defendant's line of road is intersected and crossed by two other lines of railroad, known as the — Railroad and the — Railroad, and that at said station and village of E. the said three lines of railroad use and occupy in common one passenger depot. Plaintiff at said time was obliged and compelled to cross the tracks of the defendant's said railroad, in order to reach said depot used and occupied by the defendant as a passenger depot, and that the defendant company invited the traveling public and passengers for defendant's trains, including the plaintiff, to cross defendant's tracks to said depot for passage on defendant's trains.

On the day above written plaintiff approached the track of defendant's said road at said station, from the west side thereof, for the purpose of going into the said depot of said defendant to take passage upon a train of said defendant company, and that as the plaintiff approached defendant's track for the purpose aforesaid, plaintiff listened and looked in each direction, north and south, along defendant's track, to learn of the approach of any locomotive engine or cars, and could see none in motion, and could hear none in motion, and, believing the way safe, started across defendant's track, and when he got upon said track, without signal of any kind by bell or whistle or otherwise, an engine belonging to said

defendant, and in charge of the servants and employees of defendant, dashed upon him from the south on said track, and that plaintiff had no notice or warning of the approach of said engine until it was upon him, when it was too late to escape from the track or escape said engine, and impossible for plaintiff to avoid being caught by said engine, and that he was then and there caught by said engine and injured as hereinafter stated.

The plaintiff avers that said servants and employees and agents of the defendant then and there so unskilfully and negligently operated and managed said engine, that while the night at said hour was dark they had no head-light on said engine, nor had they on said engine, at said time, any other light to give warning ahead of it of its approach, and that said servants and agents in charge of said engine sounded no whistle and rang no bell to give notice and warning of the approach of said engine at said station at the time of said injury, but on the contrary, without any head-light and without any signal of any kind of its approach, said servants and agents negligently and unlawfully caused said engine to run upon the plaintiff and crush his leg as aforesaid, by reason of which he [*state injuries and damages*], whereby the plaintiff has been damaged by the defendant in the sum of \$—, for which sum the plaintiff asks judgment against said defendant.

Sec. 931. Petition for injury to person in vehicle at street crossing caused by negligent backing of train.—

[*Caption and formal averments.*]

1. That on the — day of —, 18—, the said plaintiff was traveling with a wagon and team of horses along a certain much traveled public highway known as — street, in the incorporated village of —, — county, Ohio, which highway crosses the defendant's railroad between [*state where*], in said village of —, — county, Ohio. That on the — day of —, 18—, the defendant had one of its locomotives and train of cars standing at its station, on its track, in the said village of —, — county, Ohio. That the plaintiff, on said — day of —, 18—, while traveling on said public highway, was crossing said railroad track where it intersects with said — street, —, Ohio, and the defendant negligently caused one of its locomotives and train of cars to back over said railroad track towards said crossing, and negligently and carelessly omitted, while so backing said train towards said crossing, to give any signal by bell or whistle; and said defendant wrongfully and negligently failed to have stationed at the rear end of said train of cars a watchman or brakeman, in order that they might discover any danger ahead and avoid the same; by reason whereof, and of the negligence of the defendant in so backing its said train, the plaintiff was unaware

of its approach, and by reason of said negligence, and without any fault or negligence on the part of plaintiff, the caboose of said train of cars struck and destroyed said wagon, and plaintiff [without fault or negligence], and to avoid injury, jumped from his said wagon and fell with great violence to the ground [*state injury*].

2. By reason of which injury plaintiff became, and is, and for a long time will be, lame and sick, and has been and will be for a long time unable to attend to his business, and plaintiff has been put to great expense for attendance and nursing, to his damage in the sum of \$——.

Wherefore plaintiff prays judgment against the defendant for the sum of \$——, his damages so as aforesaid sustained.

NOTE.—Modeled from *L. E. & W. R. R. Co. v. Stadler*, Supreme Court, unreported, 27 W. L. B. 376, affirming judgments of circuit and common pleas courts. A demurrer to this petition was overruled, it being claimed that there should have been a negative averment that the act of jumping and falling was without his fault or negligence. A general allegation of negligence, however, is good as against a general demurrer (*Harper v. Railroad Co.*, 36 Fed. Rep. 103); and is equivalent to whatever degree of negligence is necessary to sustain the petition. *Nolton v. Railroad Co.*, 15 N. Y. 44; *Rockford, etc. R. R. Co. v. Phillips*, 66 Ill. 551. A different rule prevails in regard to the conduct of a person who is in imminent peril (*Robison v. Railroad Co.*, 48 Cal. 421), and he cannot be charged with contributory negligence. *Bigelow on Torts*, 810, 811; *Coulter v. Am. Ex. Co.*, 56 N. Y. 580.

Day, J., in the principal case, *L. E. & W. R. R. Co. v. Stadler*, charged that: It is necessary to prove that the backing of the train on to the wagon, resulting in injury to the plaintiff, was done by the employees of the defendant under such circumstances as to show negligence on their part, to entitle the plaintiff to recover. . . . That if they omitted to so use their faculties, but instead, without warning or signal, suddenly backed their train onto the crossing, they would be guilty of negligence.

Duty of plaintiff.—“He must look and listen to ascertain if there is danger, and avoid it. If he fails to do this, he is not in the exercise of ordinary care, but is negligent.”

As to relative rights and duties of travelers upon a public highway, and railroad companies, at a crossing common to both, see *Robinson v. Railroad Co.*, 48 Cal. 409; *Harriman v. Railway Co.*, 45 O. S. 11.

Sec. 932. Negligence—Defenses.—The duty is imposed upon every one to use ordinary care to protect himself even against the negligence of another. Conflict of judicial opinion prevails upon the question as to whether or not contributory negligence of a plaintiff must be specially pleaded, or whether it may be shown under a general denial that the plaintiff was himself negligent, contributing to the injury. Many authorities, on the one hand, regard contributory negligence as an affirmative defense, which to be available must be specially pleaded, and hence evidence showing it could not be introduced under a mere denial.¹ On the other hand, an-

¹ *O'Connor v. Railroad Co.*, 94 Mo. Mo. 147; *Schlereth v. Railroad Co.*, 155; *Donavin v. Railroad Co.*, 89 96 Mo. 509; *Hudson v. Railway Co.*,

other array of authorities support the rule that contributory negligence may be shown under a general denial.¹ Ordinarily conflict of authority is not very consoling when action is to be taken; but in this instance it is quite immaterial, as the pleader may set forth the fact that the plaintiff was guilty of negligence contributing to the injury, and let the matter of conflict end. But law is a science, and every rule is supported by reason, good or otherwise. Unlike the lawyer, a writer should not pass conflicting questions in silence. If this question were to be decided from a technical standpoint, the result would be to require contributory negligence to be specially pleaded, as, under a general denial, the question of the truth of the facts stated in the petition only is presented;² and under the code general denial the same latitude is not given as under the general issue at common law.³ Hence it would seem that the question for consideration under a general denial of negligence would be whether the *defendant* was the cause of the injury, and under that state of the pleadings only evidence going to that point could be considered; and as the purpose of pleadings is to present the claims of either side, if a defendant desires to claim that the plaintiff himself was the cause of the injury, let him say so. But we must submit that some courts have not been so technical. Upon the question of negligence the rule has not been as strictly observed as in other cases;⁴ for, under a general denial of negligence, evidence has been admitted to show that the injury resulted from the negligence of third persons.⁵ Although it is a defense, when the petition of the plaintiff contains facts which show that the plaintiff was guilty of contributory negligence so as to defeat a recovery, the question may properly

101 Mo. 13; Geiselman v. Scott, 25 O. S. 68; Hibbard v. Thompson, 109 Mass. 286; Railroad Co. v. Washburn, 5 Neb. 117. Contributory negligence is a defense which must be pleaded. Johnston v. Railway Co., 23 Oreg. 94 (1892); Grant v. Baker, 12 Oreg. 329. The author has discussed this matter in *ante*, sec. 75-2.

¹ St. Anthony Water Power Co. v. Eastman, 20 Minn. 281; Cunningham v. Lyness, 23 Wis. 245; McDon-

nell v. Buffum, 81 How. Pr. 154; Board v. Legg, 98 Ind. 523; Hocum v. Witherick, 23 Minn. 152.

² This view is shared by Judge Maxwell. Maxwell on Code Pleading, p. 485.

³ *Ante*, sec. 70.

⁴ See *ante*, sec. 70.

⁵ Hoffman v. Gordon, 15 O. S. 211; Boone on Code Pleading, sec. 74, note 6, sec. 175, note 3, etc.

be raised by a demurrer.¹ A person is guilty of contributory negligence such as will defeat a recovery if he walks upon a railroad track and omits to keep watch of the movements of a train, relying upon the rule or custom of the employees to give signals.² The failure of a person to use his ordinary faculties to avoid an injury renders him guilty of such negligence as will defeat an action by him.³

The doctrine of contributory negligence is not applicable to children, as their conduct cannot be judged by the same rule as is applied to the actions of adults.⁴ There can be no recovery by a person who was injured while upon the property of a railroad company by mere sufferance, and who is not there for the purpose of transacting business;⁵ nor by a person who voluntarily places himself in a dangerous position,⁶ as a person with full knowledge of danger, voluntarily and unnecessarily assuming the risks incident thereto, cannot be regarded as exercising ordinary prudence, and cannot, therefore, maintain an action for an injury thereby resulting.⁷ Nor can a plaintiff recover for the negligence of another if it appears that he might, by the exercise of ordinary care, have avoided the consequence of the negligence complained of.⁸ An answer denying that the defendant committed the act charged, and alleging that it was done by a third person, amounts only to a denial, and hence does not require a reply to be made thereto.⁹

Sec. 933. Answer of company averring knowledge of movement of trains by plaintiff.—

For a first ground of defense defendant says: Except the averments in plaintiff's petition that defendant is a corporation duly organized under the laws of Ohio, and owned and

¹ Favre v. Railroad Co., 16 S. W. Rep. 370 (Ky., 1891).

⁵ Railroad Co. v. Bingham, 29 O. S. 364.

² Railroad Co. v. Depew, 40 O. S. 121. A company is not liable for an injury to a person on its tracks unless it be the result of wilful negligence. Driscoll v. Railway Co., 1 O. C. C. 493.

⁶ Railroad Co. v. Morley, 4 O. C. C. 559.

³ Pennsylvania Co. v. Rathgeb, 32 O. S. 66.

⁷ Schaeffler v. Sandusky, 33 O. S. 249; Penn. Co. v. Rathgeb, 32 O. S. 66; Evans v. Utica, 69 N. Y. 166; Wilson v. Charleston, 8 Allen, 137; Belton v. Baxton, 54 N. Y. 245.

⁴ Railroad Co. v. Corrigan, 46 O. S. 283.

⁸ Timmons v. Railroad Co., 6 O. S. 105.

⁹ Hoffman v. Gordon, 15 O. S. 212.

occupied a certain railroad as alleged, with track, cars, etc., and that it had and kept a bulletin board at said N. passenger depot, and that plaintiff was injured on the day named by the train named, and his leg crushed, the defendant denies each and every averment and allegation contained in the petition.

And for a second ground of defense defendant avers that plaintiff was well acquainted with the movement of trains and the tracks and premises where he was injured, and on said — day of —, 18—, without necessity or excuse therefor, went upon defendant's railroad track, and, by his own negligence and want of ordinary care, directly contributed to said injury.

J. M. L.,

Defendant's Attorney.

NOTE.— From *Railway Co. v. Herrick*, 49 O. S. 25.

Sec. 934. Answer by company setting up bad health of plaintiff prior to injury.—

[*Caption, etc.*]

Defendant says that, long before the day the collision took place, plaintiff was in a bad state of health, and that his injuries, if any he received, were caused by his bad state of health, and by his own fault, incapacity and want of care; and that his present disabilities, if any there are, were not caused by said accident.

CHAPTER 66.

NEGLIGENCE CAUSING INJURY TO PROPERTY.

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| <p>Sec. 935. Negligence causing injury to property.</p> <p>936. Petition for negligently setting fire to woodland so that it spread upon a neighbor's farm.</p> <p>937. Petition for negligently permitting natural gas to escape and cause explosion.</p> <p>938. Petition for negligent excavations near plaintiff's building.</p> | <p>Sec. 939. Petition against owner of vehicle for negligence in driving same against vehicle of another.</p> <p>940. Petition for negligently failing to protest bill of exchange.</p> <p>941. Petition against railroad for injury by collision with horse and wagon at street crossing.</p> |
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Sec. 935. Negligence causing injury to property.—The same general rules discussed in preceding sections will apply to this branch of negligence¹ as to the essential averments of negligence. A petition to recover damages to property is sufficient if it charges that the act which resulted in the injury was carelessly and negligently done, without alleging the specific acts constituting the negligence.² No inference of negligence arises from the mere fact that an injury to adjacent property was caused by sparks emitted from a locomotive;³ but where it appears that a locomotive properly constructed and equipped with the best appliances will not emit sparks, and that a fire was in fact caused by such a locomotive, the burden is upon the company to show that its locomotive was in good order.⁴ In an action against a mill-owner for damages to property by fire caused by sparks negligently thrown from a smoke-stack, it is no defense that the fire first burned an intervening building, from which it was communicated to the building in which the property burned was situated.⁵ An ac-

¹ *Ante*, sec. 915, 916, 932.

² *Railway Co. v. Craycraft*, 5 Ind. App. 385; 82 N. E. Rep. 297; *Railway Co. v. Wynant*, 100 Ind. 160; *Railway Co. v. Jones*, 108 Ind. 551. But

see *ante*, sec. 916. For injury to animals, see ch. 15.

³ *Ruffner v. Railroad Co.*, 34 O. S. 96.

⁴ *Railroad Co. v. Fredenbur*, 8 O. C. C. 23.

⁵ *Adams v. Young*, 44 O. S. 80. See

tion for an injury to property is not abated by the death of the person entitled or liable to the same.¹

Sec. 936. Petition for negligently setting fire to woodland so that it spread upon a neighbor's farm.—

Plaintiff was on the — day of —, 18—, the owner and seized in fee-simple and in possession of the following premises situate in the township of —, in the county of —, in the state of Ohio, containing — acres of land, to wit: [*Description.*]

That the defendant is and was on the — day of —, 18—, the owner of a certain farm adjoining [*or, near to*] the said farm of plaintiff. That the defendant, not regarding the safety and preservation of the property of the said plaintiff, did, to wit, on the — day of —, 18—, set fire to the wood, trees or timber then and there standing and growing on the said land so possessed [*and owned*] by him, the said defendant, as aforesaid, and did then and there so carelessly, negligently and improvidently manage, direct and conduct the said fire that by and through the mere carelessness, negligence and mismanagement of the said defendant, his servants and agents, in and about the said fire, and the spreading thereof to the farm, etc., of the said plaintiff, the following property of this plaintiff was burned and destroyed, to wit: [*describe property*], which was of the value of — dollars, from the spreading of the fire aforesaid. The spreading of said fire might and could have been then and there prevented had the said defendant used due care and attention to prevent the same, by means of which said want of care as aforesaid of the said defendant the said property of plaintiff was then and there entirely burnt, consumed, destroyed and lost to the said plaintiff by the spreading of the fire as aforesaid, to his damage in — dollars, for which he demands judgment.

NOTE.—No action will lie by reason of setting fire to woodland whereby it escapes upon his neighbor's premises, unless there is some misconduct or negligence in him or his servants. *Clark v. Foot*, 8 Johns. 422; *Losee v. Buchanan*, 51 N. Y. 487, citing *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Bargar*, 44 Barb. 424; *Lansing v. Stone*, 37 Barb. 15; *Batchelder v. Heagan*, 18 Me. 32; *Tourtellot v. Rosebrook*, 11 Met. 460. See cases cited by Maxwell on Code Pldg., p. 723. It is not material in such actions whether the proof shows gross negligence or only want of ordinary care. *Barnard v. Poor*, 31 Pick. 378.

Sec. 937. Petition for negligently permitting natural gas to escape and cause explosion.—

That on the — day of —, 18—, plaintiff was the owner in fee-simple of the following described real estate, to wit: [*Description.*]

Ryan v. Railroad Co., 35 N. Y. 210; ¹ R. S., sec. 4975, amended, 90 O. L. *Railroad Co. v. Kerr*, 63 Pa. St. 353. 140.

That plaintiff was also on said day the owner of the dwelling-house situated on said real estate, which house was of the value of — dollars [and on said day contained personal property belonging to plaintiff of the value of — dollars].

That the defendant was a corporation, organized under the laws of the state of Ohio, engaged in furnishing natural gas for fuel and light to the citizens of the — of —, having and owning gas mains and gas pipes laid in the streets of said —, and immediately in front of plaintiff's said house, through which mains and pipes it supplied the citizens of said — with natural gas for fuel.

That the defendant so carelessly laid, constructed and maintained said pipes and gas mains that natural gas flowed and escaped therefrom, without the fault or negligence of plaintiff, through the ground and into plaintiff's dwelling-house and cellar thereunder, and accumulated in said house and cellar in such quantity that the same came in contact with a lighted lamp therein, without the fault of plaintiff, and set fire to and destroyed said house and its contents, without any fault of plaintiff, to plaintiff's damage in the sum of — dollars, for which he demands judgment.

NOTE.—A natural-gas company must use ordinary care in placing its pipes and mains as to prevent the escape of gas therefrom in such quantities as to become dangerous to life and property. *Mining Co. v. Patton*, 129 Ind. 472. See *Omslaer v. Philadelphia Co.*, 81 Fed. Rep. 354; *Emerson v. Powell*, 8 Allen, 410, on the question of liability for leakage.

Statutory liability.—R. S., sec. 8561a, imposes the duty on natural-gas company to keep gas under its control, rendering it liable in damages for injury by explosion, although not negligent in regard thereto. *Gas Fuel Co. v. Andrews*, 50 O. S. 695.

Sec. 938. Petition for negligent excavations near plaintiff's building.—

That on the — day of —, 18—, the plaintiff was the owner in fee-simple of the following real estate, to wit, lot —, in block —, in the city of —, in — county, state of Ohio, with the dwelling-house thereon; said premises adjoined certain lands of the defendant, and said dwelling-house of right rested upon and was supported in part by said contiguous lands and by the strata under the same.

That on the — day of —, 18—, the defendant wrongfully and negligently dug on the lot adjoining plaintiff's said lot, owned by said defendant, deep excavations for the purpose of erecting a building adjoining plaintiff's, digging such excavations a depth of — feet and within — feet of plaintiff's building, and defendant failed and neglected to place proper supports in said excavation so as to securely protect the foundation to plaintiff's said building.

That by reason of the digging of said excavation, and of the negligence of said defendant to take the proper precau-

tions to protect the foundation to plaintiff's building, the same gave away — feet, thereby causing plaintiff's said building to drop — feet and break the wall thereof. [*State damages.*]
[*Prayer.*]

Sec. 939. Petition against owner of vehicle for negligence in driving same against vehicle of another.—

That heretofore, on the — day of —, 18—, the said plaintiff, at —, was the owner of a certain carriage, of the value of — dollars, and of a certain horse, then and there drawing the same, and in which said carriage the said plaintiff was then riding in and along a certain public and common highway. Said defendant was also then and there the owner of a certain other carriage and horses, which were then and there under the care, government and direction of [a certain person, then the servant of] the said defendant, who was then and there driving the same in and along the said highway, to wit, at —. That said defendant [by his said servant] so carelessly and improperly drove, governed and directed his said carriage and horses, that by and through the carelessness, negligence and improper conduct of the said defendant [by his said servant] in that behalf [one of the hind wheels of] the said carriage of the said defendant, without the fault of the plaintiff, then and there ran and struck with great force and violence upon and against the said carriage of the said plaintiff, and thereby crushing, breaking to pieces, damaging and destroying the same [and one of the wheels, and the splinter-bar and one of the shafts thereof], thereby rendering plaintiff's said carriage of no use or value to the said plaintiff, and said plaintiff was thrown out with great force and violence from and off his said carriage upon the ground, thereby injuring him in the following manner: [*State injury and damages.*]

Wherefore the plaintiff says that he is damaged in the sum of — dollars, for which he demands judgment.

Sec. 940. Petition for negligently failing to protest bill of exchange.—

[*Caption and formal averments.*]

On the — day of —, 18—, plaintiff, being the owner of and desiring the collection of a certain bill of exchange, duly transmitted and delivered the same to the First National Bank of — for collection, a copy of which bill with the indorsements thereon is as follows: [*Copy and indorsements.*]

The defendant thereupon for a valuable consideration received said bill of exchange and agreed to collect the same for plaintiff, and it thereby became the duty of said defendant under said contract to present the same to A. B. for acceptance and payment, and in case the said A. B. did not

accept or pay the same, said defendant agreed to cause the said bill to be properly and duly protested according to law.

Plaintiff further states that said A. B. did not accept or pay said bill of exchange, and that said defendant did thereupon negligently fail to have said bill of exchange protested according to law, and wholly failed and neglected to place said bill of exchange in the hands of a notary public that the proper steps might be taken to charge the drawer and indorsers thereof, and that by reason of defendant's negligence in this behalf said bill of exchange was wholly lost to plaintiff, to his damage in the sum of \$——, for which he asks judgment.

NOTE.—As to duties and liabilities of bank in making collections, see *ante*, sec. 284.

Sec. 941. Petition against railroad company for injury by collision with horse and wagon at street crossing.—

Plaintiff complains of the defendant, the —— Railroad Company, a corporation created under the laws of Ohio, for that the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, to wit, on the —— day of ——, 18——, was the owner and in possession of a certain railroad and operating the same through the city of C., and leading from the city of C. to the city of D., in said state of Ohio, and of certain cars and a locomotive running thereon. The plaintiff further says that he was then the owner and in possession of one wagon, two horses and one double set of harness, of the value of \$——, and on said —— day of ——, 18——, a locomotive and train of cars, so owned and in the possession of the defendant, was so carelessly and negligently managed and run by it, its agents and servants in its behalf, through the said city of C., and across G. street, a public street in said city, and at such great rate of speed and without signals or other warning, as to strike the said horses and wagon, killing the said horses and utterly destroying the said wagon and harness, without any fault or neglect whatever on the part of the plaintiff, his agents or servants. And the plaintiff further says that said horses were struck and killed and said wagon with said harness was struck and wholly destroyed, so as aforesaid, solely through and by the carelessness and negligence of said defendant, its agents and servants engaged in the operation and management of said railroad train, to the damage of the plaintiff in the sum of \$——.

Wherefore the plaintiff prays judgment against the defendant for the sum of \$——, with interest from ——, 18——, and for costs.

L., K. & K., Attorneys for Plaintiff.

NOTE.—From C., H. & D. R. R. Co. v. Brigel, Supreme Court, unreported, No. 1715. Judgment in favor of petitioner affirmed. See *Railway Co. v. Schneider*, 45 O. S. 678.

CHAPTER 67.

NUISANCE.

Sec. 942. Nuisance defined.

- 943. Nuisance—Action at law for damages.
- 944. Petition for damages for operating tannery so as to become a nuisance.
- 945. Petition for damages for nuisance arising from the keeping of stock-yards.
- 946. Petition for damages by removing party-wall.
- 947. Petition for obstructing right of way.
- 948. Petition for projection of building over another's land.

Sec. 949. Nuisance—Remedy in equity.

- 950. Petition to enjoin the discharge of surface water upon land of another, and for damages.
- 951. Allegations charging that a brewery is a private nuisance, prayer for injunction, and special injury to individual.
- 952. Nuisance—Defenses to actions for.

Sec. 942. Nuisance defined.—A nuisance in law is a wrongful annoyance or injury or anything that worketh hurt or inconvenience or damage. That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use and occupation physically uncomfortable to him. The law will afford redress by giving damages, and, when the cause of the annoyance is continuous, equity will interfere and restrain the same.¹ An actionable nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.² What amount of annoyance or inconvenience will constitute a nuisance depends on varying circumstances, and cannot be precisely defined.³ The action abates by the death of either

¹Crump v. Lambert, L. R. 8 Eq. 409; Railroad Co. v. Church, 108 U. S. 829. See Cardington v. Fredericks, 48 O. S. 446; McClung v. Coal & Coke Co., 81 W. L. B. 9 (Ham. Co. C. P., 1898), and authorities reviewed.

²Railroad Co. v. Carr, 88 O. S. 458; Cooley on Torts, p. 566; Columbus Gas, etc. Co. v. Freeland, 12 O. S. 892.

³Columbus Gas, etc. Co. v. Freeland, *supra*.

party.¹ There are two remedies for a nuisance: one at law, the other in equity.²

Sec. 943. Nuisance — Action at law for damages.—The same rule as to sustaining special damages from a nuisance applies to an action at law by an individual as in equity, and no recovery can be had by an individual for damages on account of a public nuisance, unless he has sustained an injury different from that of others; and this is so whether it be a private or public nuisance.³ Where several injuries are alleged in a petition, the amount of damages caused by each should be stated.⁴ There are some instances where the law will presume damages, rendering proof of actual damages unnecessary.⁵ Where an act innocent in itself becomes injurious only by reason of particular circumstances, the petition should contain a full statement of the facts showing the wrong and damages resulting therefrom.⁶

The petition must state fully all of the facts which in law constitute a nuisance from which the plaintiff has suffered; an injury of a character different from that alleged cannot be shown.⁷ An owner of property not in possession cannot complain of a nuisance upon it when he has not suffered any special damages. The only injury he could sustain in such a case would be a diminution of rent or the expense of making repairs.⁸ The actual damages from the nuisance in such a case may be properly recoverable by the person in possession though

¹ R. S., sec. 5144, amended, 90 O. L. Me. 161; 74 Am. Dec. 482, and note; 140; Cardington v. Fredericks, *supra*. Doolittle v. Supervisors, 18 N. Y. 155;

² Secs. 943, 944, *post*.

³ *Schlueter v. Billingham*, 14 W. L. B. 224. See sec. 944, *post*; *Francis v. Schoellkopp*, 53 N. Y. 152; *Barkau v. Knecht*, 10 W. L. B. 342; *Ett v. Snyder*, 6 Am. L. Rec. 415. Under some codes an individual may sue to abate a public nuisance and recover damages, though the injury is sustained by the public in general. *Harley v. Brick Co.*, 83 Ia. 73; 48 N. W. Rep. 1000. The complaint in such cases must therefore allege the special damages sustained. *Farrelly v. Cincinnati*, 2 Disn. 516; *Clark v. Railway Co.*, 70 Wis. 593; *Brown v. Watson*, 47

Turnpike Co. v. Railroad Co., 41 Cal. 562; *Aran v. Schallenberger*, 41 Cal. 449; *Atwood v. Bangor*, 83 Me. 582; 22 Atl. Rep. 466; *Walley v. Ditch Co.*, 15 Cal. 579.

⁴ *Grandona v. Lovdal*, 78 Cal. 611; 12 Am. St. Rep. 121.

⁵ *Chatfield v. Wilson*, 27 Vt. 670.

⁶ *Hess v. Lupton*, 7 O. (Pt. 1), 216. It is not necessary to charge a defendant with negligence. *Powder Co. v. Tearney*, 23 N. E. Rep. 389 (Ill., 1890).

⁷ *O'Brien v. St. Paul*, 18 Minn. 176-180.

⁸ *Dieringer v. Wehrman*, 12 W. L. B. 222.

not the owner of the premises.¹ An owner of real estate who places a nuisance upon it and demises it to another is liable for any injury sustained therefrom.² And he is liable where he suffers a nuisance to be created by another in the prosecution of a business for his benefit for an injury resulting therefrom to a third person.³ An action may be sustained in one state for damages to property occasioned by the diversion of water, although the act was committed in a sister state.⁴ An action may also be maintained for the recovery of damages for a nuisance which consists in preventing surface water from flowing in its natural course, causing it to flow upon the land of another.⁵ An allegation setting forth a wrongful structure and its prevention of the natural flow of water is sufficient to show an injury.⁶ An interference with subterranean or percolating waters is an injury which may be properly classed under this head, and is a subject upon which the law has been variously declared. Some courts hold that an excavation on an owner's land, as by digging a well which draws off the water from the land of another, is *damnum absque injuria*.⁷ An action cannot be sustained for any obstruction or diversion of water of a stream for any purpose unless the damage occasioned thereby is material or substantial.⁸ Nor can an action be sustained for the flowing back of waters by a dam in the body of a stream unless some actual injury is sustained.⁹ But where an embankment has been dug which turns the water of a river from its natural channel and causes the same to overflow, inundate and injure the lands of another, an action for damages will lie.¹⁰

It is a well-understood rule of law that every property owner upon a stream is entitled to the enjoyment of the same without any interruption by another. One property owner may change the course of the stream upon his own land if he restores it to its proper channel before leaving his premises

¹ Hopkins v. Railroad Co., 6 Mackey, 311.

² McElvaine v. Wood, 2 Handy, 166.

³ Clark v. Fry, 8 O. S. 358. The rule of damages is the injury actually sustained at the commencement of the suit. Thayer v. Brook, 17 O. 489.

⁴ Thayer v. Brook, *supra*.

⁵ Toothe v. Clifton, 22 O. S. 247.

⁶ Toothe v. Clifton, *supra*.

⁷ Greenleaf v. Francis, 18 Pick. 117.

⁸ McElroy v. Goble, 6 O. S. 187.

⁹ Cooper v. Hall, 5 O. 321.

¹⁰ Byrd v. Blessing, 11 O. S. 366, and cases cited.

and does not injure the lower property owner. All diversions of water from a water-course are not unlawful, and must depend upon the circumstances.¹ When a person materially diverts water from a natural water-course which has a peculiar value for certain purposes, whether such course be above or below the surface of the earth, thereby causing a substantial injury or damage to an upper proprietor, he is not remitted to his action for damages, but may restrain such wrongful diversion.²

The discharge of fireworks in the streets of a city is *per se* a public nuisance, and all who are concerned therein are liable in damages for any injury occasioned thereby.³ An action will also lie for the recovery of damages caused by a nuisance which affects the health of a person.⁴ A verdict and judgment in an action for a nuisance is not conclusive evidence of a right to recovery in a subsequent action between the same parties for a continuance of the nuisance.⁵

Sec. 944. Petition for damages for operating tannery so as to become a nuisance.—

[*Caption and formal averments.*]

That for more than — years last past plaintiff has been and is now the owner and in possession of the following described property in the city of —, county of —, Ohio: [*Description.*]

That plaintiff has during all this time used and occupied said premises as [*state what, as:* and for a water-cure establishment and hotel. That plaintiff has at great expense furnished and equipped said hotel, etc.; and that by reason of its location it had acquired a great reputation and was visited by a large number of persons, and would now be, if it were not for the nuisance maintained by the defendants hereinafter set forth] [*or, as a dwelling-house.*]

That the defendants have since the construction of said plaintiff's premises, to wit, on or about —, 18—, constructed a building [*describe where*], in which they have since the — day of —, 18—, carried on the business of tanning and currying hides and manufacturing and finishing leather in their said premises, and have purchased large quantities of hides, and have manufactured the same into leather, and have also

¹ Maxwell's Code Pldg., 439; Castalia Trout Club Co. v. Castalia Sporting Club, 8 O. C. C. 194.

² Castalia Trout Club Co. v. Castalia Sporting Club, *supra*.

³ Cameron v. Heister, 22 W. L. B. 384; Spier v. Brooklyn, 136 N. Y. 9; 80 W. L. B. 365.

⁴ Story v. Hammond, 4 O. 377.

⁵ Sheppard v. Willis, 19 O. 142.

rendered the fleshings and refuse from such hides on said premises, and have constantly exposed to the air on said premises large quantities of hair, fleshings and animal matter as well as tan bark and other offensive matter, and have thereby caused noxious vapors, offensive odors and smoke and soot to invade the premises of plaintiff, and have tainted and corrupted the atmosphere in and about said premises, and have thereby rendered plaintiff's said premises unwholesome, uncomfortable and unfit for habitation and wholly unfit for the purpose of [*state what, dwelling or otherwise*], and have rendered the premises of little or no value. That the occupancy of plaintiff has been thereby rendered intolerable, and by reason of the premises the plaintiff has suffered damages in the sum of \$—, for which he asks judgment against said defendants.

Sec. 945. Petition for damages for nuisance arising from the keeping of stock-yards.—

[*Caption.*]

The plaintiff is the owner in fee and occupying the following premises situate in the city of —, county of —, and state of Ohio, to wit: [*Description*]. [*Then state purpose for which premises are used, as:* That said premises were used by himself and his tenants for stores and dwelling-houses.]

That the defendant has been during — years last past the owner and in possession of lot No. — [*description*], diagonally across the street from the premises of plaintiff.

That the defendant has kept and maintained on the said lot during the past [*state time*], and now keeps sheds, yards and pens, where he kept and allowed to be kept, and still keeps, cattle, calves, sheep and hogs, for market and otherwise. That the animals have caused offensive and noxious smells and loud and offensive noises, and the pens have caused offensive and noxious smells, particularly annoying, disturbing and injuring the plaintiff in the occupation of said premises and greatly lessening the value thereof, and reducing the rental value thereof, to his damage in the sum of \$—, for which sum he asks judgment against said defendant.

NOTE.— A nuisance to be actionable must *materially* affect or impair the comfort or enjoyment of individuals or the use or value of property. *Stadler v. Grieben*, 61 Wis. 500. No person is liable as for a nuisance merely because he keeps a stock-yard, unless he keeps it in such a manner as to interfere with the comfort of persons or impair the value of property. *Id.* *Pennoyer v. Allen*, 56 Wis. 511.

Sec. 946. Petition for damages by removing party-wall.—

Plaintiff is and has been since the — day of —, 18—, the owner of a house, No. —, — street, in the city of —, in the state of Ohio, adjoining a certain other house known as No. —, — street, in said city, belonging to the defendant; that the defendant on or about the — day of —,

18—, wrongfully deprived the plaintiff of the support to his said house by pulling down his said adjoining house without propping up or in any way supporting or securing the plaintiff's said house; that the walls of the plaintiff's said house were thereby cracked, damaged and injured, to the plaintiff's damage in the sum of — dollars, for which he asks judgment.

Sec. 947. Petition for obstructing right of way.—

That on the — day of —, 18—, plaintiff was and still is the owner in fee-simple of a certain tract of land at — [*describe shortly*], and had and ought to have a right of way from the northwest corner thereof, over defendant's lands, to a certain public highway, known as the — road, with the right to pass and repass on foot and with teams, wagons and carriages.

That the defendant on said day [and while plaintiff was possessed of said tract of land] wrongfully obstructed said way by building a fence across it, and still continues, and for — days continued, said obstruction, thereby preventing plaintiff from enjoying said way, to plaintiff's damages in the sum of — dollars, for which he demands judgment.

Sec. 948. Petition for projection of building over another's land.—

That before and at the time of the commission of the grievance hereinafter mentioned, he was and still is the owner in fee-simple of certain premises, abutting on — street, so called, in [*here describe the plaintiff's premises by metes and bounds*]; yet the defendant, well knowing the premises, wrongfully and injuriously kept and continued from and upon the wall of his premises adjoining those of the plaintiff as aforesaid, a certain building projecting and overhanging the plaintiff's said premises, and before then wrongfully projected and built, projecting as aforesaid for a long space of time, to the plaintiff's damage in the sum of — dollars, for which he asks judgment.

Sec. 949. Nuisance — Remedy in equity.— The restraint of an established nuisance is an admitted ground of equity jurisdiction. Yet it is well understood that equity will not interfere where the injury is of such nature that an action at law will afford adequate redress, unless the party seeking aid brings himself within the clearest principles of equitable relief.¹ It

¹McCord v. Eiker, 12 O. 388; Eiker, *supra*; Wood on Nuisance, Goodall v. Crofton, 33 O. S. 271. secs. 85, 86. In all cases it must clearly appear that the thing to be equity is based is that it will cause prohibited is a nuisance and is of an irreparable injury. McCord v. such character that it will cause ir-

has been said that, where there is an adequate remedy in an action for damages, the plaintiff must first establish his right at law before seeking aid in equity; and that where it has not been so established, and is of a doubtful character, relief will not be granted in equity.¹ This rule, however, is confined to cases where the right of the plaintiff is of a doubtful or questionable character, and cannot be applied where it is perfectly clear,² as an injunction will ordinarily lie in the first instance where it is a nuisance *per se*.³ It is not always essential that the injury arising from the nuisance be shown to be inevitable to maintain the action.⁴ Equity will not only restrain an existing nuisance but will prevent the creation of one;⁵ and in such cases the pleader should exercise great caution in setting forth the facts, so as to clearly show that a nuisance will be created, which must be done not upon mere belief but from actual knowledge.⁶ An individual may have two remedies for a nuisance, depending upon the circumstances; namely, one for damages which have already been sustained, and another in equity to restrain its further commission.⁷ Where it is of such a permanent character as will cause loss of health, trade, destruction of means of subsistence or permanent injury to property, it will be enjoined.⁸

Although it is a general rule that a private action cannot be sustained for a public injury, it is equally well settled that an individual who suffers a special injury, different in character from that sustained by the general public, may maintain the action;⁹ and he must therefore aver special damages in

reparable injury at once if not prevented, before the court will interfere by injunction. *McGuire v. Bloomingdale*, 1 Toledo Legal News, 126 (Lucas Co. Com. Pl., 1894).

¹ *Goodall v. Crofton*, *supra*; 10 Am. & Eng. Ency. of Law, p. 880; *McCord v. Eiker*, *supra*; *High on Inj.*, sec. 740.

² *High on Injunctions*, sec. 740; *Bridge Co. v. Railway Co.*, 6 Paige, 568.

³ *Babcock v. Stock-yard Co.*, 5 C. E. Green, 296; *Robinson v. Baugh*, 81 Mich. 290.

⁴ *Nicholson v. Getchell*, 96 Cal. 894; 81 Pac. Rep. 265.

⁵ *Wood on Nuisance*, sec. 796.

⁶ *Wood on Nuisance*, secs. 796, 798.

⁷ *Akin v. Davis*, 11 Kan. 580. In fact they may be united in one complaint. *Drinkwater v. Samble*, 46 Kan. 170; *Paddock v. Somes*, 10 Mo. 226; 14 S. W. Rep. 746; *Finch v. Green*, 16 Minn. 355; *Cedar Lake Hotel Co. v. Hydraulic Co.*, 79 Wis. 297; *Wendlandt v. Cavanaugh*, 85 Wis. 256, 262.

⁸ *Weber v. Gage*, 39 N. H. 182.

⁹ *Mehrhoft v. Railroad Co.*, 51 N. J. L. 56. See *ante*, sec. 943.

his petition.¹ It is a nuisance for a person with malice to erect a barn in such a manner as to exclude light and air from the windows of the house of his neighbor, and relief may be had in equity to prevent the same;² and so with a high screen which is placed up close to the windows of a neighboring tenant so as to destroy the view;³ or a well which has been dug for the sole purpose of inflicting damage to a neighbor,⁴ although the remedy may in some instances be in damages.⁵ The entire obstruction of a navigable river, where it is used by the public, although a public nuisance, may be restrained at the suit of a private individual who has sustained a special injury;⁶ and a tax-payer may enjoin the trustees of a township from constructing a cemetery so near his dwelling as to become a nuisance;⁷ and an individual may also enjoin the use of a public street in front of his premises as a hackney-coach stand, in such a manner as to amount to an interference with the enjoyment of his premises.⁸ An individual property owner may maintain an action for nuisance against a railroad company for keeping up dangerous fires, generating and depositing about his premises noxious vapors and smokes, and for jarring and disjointing his house, making it an uncomfortable and unwholesome place for a residence.⁹ Where a large number of persons are deprived of the comforts of their homes by a nuisance, they may be joined as plaintiffs in an action to enjoin the same.¹⁰ But it is held that, to enable such persons to join in an action, an injury must affect them all in a similar way, and that it cannot be sustained where the injury to any of them is a distinct and special one.¹¹ A private

¹ *Sargent v. Railroad Co.*, 1 Handy. 52; *Shed v. Hawthorne*, 8 Neb. 179; *Francis v. Schoellkopf*, 53 N. Y. 152. ⁹ *Parrott v. Railroad Co.*, 8 O. S. 330. See *Euler v. Sullivan*, 75 Md. 616; 28 Atl. Rep. 845.

² *Kessler v. Letts*, 7 O. C. C. 108. ¹⁰ *Schlueter v. Billingsheimer*, 14 W. L. B. 224; *Robinson v. Baugh*, 81 Mich. 290; *Rowbaugham v. Jones*, 47 N. J. Eq. 337; 20 Atl. Rep. 781 (1890); *Peck v. Elder*, 8 Sandf. 126; *Cadiegan v. Brown*, 120 Mass. 493; *Palmer v. Waddle*, 22 Kan. 352.

³ *Burke v. Smith*, 69 Mich. 380; 20 W. L. B. 97. See, also, 22 W. L. B. 74. ¹¹ *Rowbaugham v. Jones*, *supra*; *Herrick v. Cleveland*, 7 O. C. C. 470; *Marseils v. Banking Co.*, 1 N. J. Eq. 31; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75.

⁴ *Chesley v. King*, 74 Me. 164; *Greenleaf v. Francis*, 18 Pick. 117; *Falloon v. Schilling*, 29 Kan. 292. ⁵ *Smith v. Putnam*, 62 N. H. 369. ⁶ *Hickock v. Hine*, 23 O. S. 523. ⁷ *Henry v. Trustees*, 48 O. S. 671. ⁸ *Branaham v. Hotel Co.*, 39 O. S. 333.

nuisance may be created by either smoke, soot or gases, and if it is continuous and of such a nature as to substantially affect physical comfort and health, it may be permanently enjoined.¹

Sec. 950. Petition to enjoin the discharge of surface water upon land of another, and for damages.—

[*Caption.*]

That at and during all the times hereinafter mentioned the plaintiff was, and still is, the owner in fee and in the actual possession of the following lands, situate in the county of — and state of —, known and described as follows, to wit: [*Description.*]

That the defendant herein is, and at all times hereinafter mentioned was, the owner in fee and in possession and occupancy of certain lands lying adjacent to and immediately west of plaintiff's lands above described, said defendant's lands being known and described as [*description*].

That on or about the — day of —, 18—, the defendant dug and constructed a fountain on his said lands at a point some sixty rods west of the west line of the lands of this plaintiff hereinbefore described, that is to say, at a point some twenty-five or thirty rods southeast from the northwest quarter of said section thirty-one, and thereby caused the subterranean waters to come to the surface and continuously flow from said fountain so constructed as aforesaid, and thereupon defendant dug and constructed a ditch in an easterly course from said fountain through a natural hill or embankment situated near the west line of plaintiff's lands, and in and upon said plaintiff's lands, and thereby caused the waters from said fountain so constructed to flow through said ditch in and upon and over the lands of plaintiff, and then and there wrongfully collected other waters in said artificial ditch so dug by defendant, and such waters were also in the same manner caused to be emptied in and upon the lands of plaintiff, and ever since said day said defendant has wrongfully maintained said ditch and wrongfully caused the waters aforesaid to flow in, upon and over the lands of plaintiff, whereby the plaintiff's grass was wholly spoiled, etc. [*Here state damages sustained.*]

And said plaintiff further alleges that the said fountain will continue to flow and the said waters of springs and other surface water will continue to flow in, upon and over plaintiff's lands to his great damage in the future, unless the defendant be enjoined and prohibited from so causing the waters aforesaid to flow through said ditch and upon said lands, and said lands will thereby become entirely worthless and of no value.

¹ *McClung v. Coal & Coke Co.*, 81 W. L. B. 9 (Ham. Co. C. P., 1898).

Wherefore plaintiff prays that the defendant be restrained from permitting the waters aforesaid to be emptied or caused to flow in, upon and over the lands of this plaintiff, and from permitting said ditch to be used for conveying water to and upon this plaintiff's lands, and that the plaintiff have and recover from the defendant the sum of \$—, his damages sustained to the date of the commencement of this action, and for such relief as may seem proper.

NOTE.— One person cannot lawfully discharge water through an artificial channel directly upon the land of another. *Pettigrew v. Evansville*, 25 Wis. 223; *Wendlandt v. Cavanaugh*, 85 Wis. 256.

Injunction and damages.— It is none the less an action in equity because damages for past injury by reason of the nuisance are claimed. *Cedar Lake Hotel Co. v. Hydraulic Co.*, 79 Wis. 297; *Wendlandt v. Cavanaugh*, 85 Wis. 256, 262.

Sec. 951. Allegations charging that a brewery is a private nuisance, prayer for injunction, and special injury to individual.—

[*Formal averments as to ownership of property, as in ante, sec. 950.*]

That defendant has for several years last past owned, and does now own, operate and maintain upon said defendant's premises, a lager beer brewery, malt house, ice houses, wash houses and other buildings, together with the necessary and usual outhouses, sheds, and usual and customary appurtenances thereunto belonging, and operates and uses, and has for many years last past operated and used the same daily in the course of its business. That in so using said premises and operating its business thereon, said defendant causes and allows to accumulate great quantities of dirty, filthy and offensive refuse water and sewage and offal from various substances.

Plaintiff alleges that he is specially and peculiarly injured and damaged by the acts of and by the maintenance and continuance of the said nuisance by said defendant, in this, to wit, that said defendant drains all its sewage, and great quantities of dirty, filthy and polluted refuse water and other substances, into an open ditch running from and out of said defendant's said brewery along and within the south line of [*state where*], and for the full length and along the entire north boundary of plaintiff's premises, and empties into the — creek, which flows and runs through plaintiff's premises. That the waters of said creek in their natural state are pure and wholesome, and are valuable to the premises through which they flow, and add to and enhance the value of said lands. And that from the rear of said defendant's brewery said defendant causes and allows to accumulate, and sends over and causes to flow and wash on plaintiff's premises, great quantities of such dirty, filthy and polluted refuse water and other unwholesome substances.

That by reason of said special injury to plaintiff his said premises have become greatly impaired and diminished in value, and if said defendant be allowed to continue such improper use of its said premises, said plaintiff's premises will be further damaged and injured and rendered unfit for a residence, and plaintiff will thereby suffer great and irreparable injury.

Wherefore plaintiff asks that the said defendant be enjoined from making such improper use of its premises, and that it may be required and compelled to desist and refrain from accumulating or causing to accumulate and to flow upon, in front of or around said premises of this plaintiff any sewage or other filthy, impure or offensive water, liquids or other substances, and from draining or sending the same into the creek aforesaid running through plaintiff's premises, and from causing said dirt, filth, refuse water and other unwholesome substances to wash upon plaintiff's premises, and for such relief as is proper.

NOTE.—The foregoing form is confined to special injury to individual for a private nuisance. Without such allegations a petition would be demurrable. See *Meiners v. Brewing Co.*, 78 Wis. 864.

Sec. 952. Nuisance — Defenses to actions for.— Any facts showing a right by prescription to maintain a nuisance, or facts which in equity show that the plaintiff should not maintain his case, may be set up as a defense.¹ It is said that an action will not lie for an inevitable accident, or for a lawful act done in a lawful manner, such as changing the channel of a stream, unless the lawful act is performed in a negligent or careless manner.² In an action by a person against a factory which is operated in such a manner as to become a nuisance, the defendant cannot urge as a defense that the factory was built before the building of the plaintiff which he claims is injured.³ Nor can the fact that a person who has knowledge that a factory is being built, and makes no objection thereto, be urged as a defense in an action for damages when such factory is operated so as to become a nuisance.⁴

¹ *Pennoyer v. Allen*, 51 Wis. 360.

Although the defense of prescription is not available to a private action to abate a nuisance. *Meiners v. Brewing Co.*, 25 W. L. B. 76; 78 Wis. 364.

² *Railroad Co. v. Carr*, 88 O. S. 458.

³ *Fertilizer Co. v. Malone*, 78 Md. 268; 20 Atl. Rep. 900; *Commonwealth v. Miller*, 25 W. L. B. 97.

⁴ *Harley v. Brick Co.*, 83 Ia. 73; 48 N. W. Rep. 1000 (1891).

CHAPTER 68.

PARTITION.

<p>Sec. 953. Partition — Nature of the action.</p> <p>954. Who may be compelled to partition.</p> <p>955. Proceedings, where had.</p> <p>956. The petition.</p> <p>957. Form of petition in partition.</p> <p>958. Allegation requiring account for rents and profits.</p> <p>959. The order and proceedings thereunder.</p> <p>960. Amicable partition.</p>	<p>Sec. 961. Partition — Defenses.</p> <p>962. Answer setting up interest and joining in prayer.</p> <p>963. Answer of guardian <i>ad litem</i>.</p> <p>964. Answer setting up advancements made.</p> <p>965. Answer claiming interest under will.</p> <p>966. Answer and cross-petition claiming title to premises under contract of purchase from decedent.</p> <p>966a. Election to be endowed out of proceeds of sale.</p>
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Sec. 953. Partition — Nature of the action.— At common law partition could only be made by consent, and could not be compelled by one or more co-tenants against others. The proceeding, therefore, adopted in this country was regarded at one time merely as a statutory one and not a civil action. In Ohio, however, the statutory proceeding, so called, was abolished, and the action is now part of the code and regarded as a civil action. It is of an equitable character, in which no right to a trial by jury exists, but is subject to an appeal. So far as this question is concerned, however, it is immaterial whether the facts stated in the petition invoke equitable jurisdiction or not.¹ It is a proceeding *in rem*.² While the code plainly provides the method of procedure and confers the right of partition upon parties, it has nevertheless always been a subject of equity jurisdiction, especially where a case involves the settlement of questions peculiarly cog-

¹ *McRoberts v. Lockwood*, 49 O. S. 374; *Swihart v. Swihart*, 7 O. C. C. 838; *Barr v. Chapman*, 7 O. C. C. 364; *English v. Monypenny*, 6 O. C. C. 554; *Stone v. Doster*, 7 O. C. C. 8; *Corwin v. Mace*, 36 O. S. 125; *Linton v. Laycock*, 38 O. S. 128; *Stableton v. Ellison*, 21 O. S. 527.

² *Barr v. Chapman*, 80 W. L. B. 264. And is regarded as a matter of right. *Smith v. Smith*, 10 Paige, 470.

nizable in courts of equity. The special statutory mode of obtaining a partition has never been considered as conclusive of that in equity.¹

Sec. 954. Who may be compelled to partition.—Tenants in common² and coparceners may, under the code, be compelled to make or suffer partition. A tenant for life who buys an individual share of a reversion;³ or a person having a right of entry;⁴ or an owner of a fee subject to an executory devise on his own death without issue;⁵ or a guardian for minors all of whom claim in one right;⁶ or a person who owns a moiety interest and is trustee for the other half,⁷ may all have or compel partition. And where there is an outstanding life estate held by one who does not own a reversionary interest or any remainder, an action for partition cannot be sustained by the owner of the reversionary interest or any remainder.⁸ And the existence of an ordinary lease for years under which a tenant is in possession, paying rent to the owner, is no obstacle.⁹ But a reversioner,¹⁰ or remainderman,¹¹ or a railroad company which has purchased an undivided interest in another railroad, thereby creating a tenancy in common,¹² or withdrawing members of an unincorporated society,¹³ can have or compel partition. And where a tenant has made separate conveyance so that the title of each person is separate and distinct, the other tenants cannot sustain a joint suit for partition against such purchaser, but must bring a separate suit against each.¹⁴ Nor can a person who has neither actual or constructive possession have partition against others holding the premises in hostility to his title, as such a proceeding

¹ *Linton v. Laycock*, 33 O. S. 128; 554. See *In re Kates*, 148 Pa. St. 471; *Corwin v. Mace*, 36 O. S. 125; *Rush v. Rush*, 29 O. S. 440; *Penn. v. Cox*, 16 O. 130. *Merrick v. Hughes*, 36 W. Va. 356.

² O. Code. sec. 5754; *Tabler v. Weisman*, 2 O. S. 207.

³ *Morgan v. Staley*, 11 O. 389; *Tabler v. Weisman*, *supra*; *Elrod v. Weisman*, 1 O. C. C. 38.

⁴ *Tabler v. Weisman*, *supra*.

⁵ *Patterson v. Earhart*, 29 W. L. B. 312.

⁶ *Goudy v. Shank*, 8 O. 416.

⁷ *English v. Monypenny*, 6 O. C. C.

⁸ *Elrod v. Bass*, 1 O. C. C. 39; *Tabler v. Weisman*, 2 O. S. 207.

⁹ *Werner v. Glass*, 16 W. L. B. 354.

¹⁰ *Birbeck v. Spollen*, 10 Am. Law Rec. 491.

¹¹ *Davidson v. Wolfe*, 9 O. 74.

¹² *Railroad Co. v. Railroad Co.*, 38 O. S. 614.

¹³ *Gaselys v. Separatists Society*, 13 O. S. 144.

¹⁴ *In re Prentiss*, 7 O. (Pt. 2), 129.

would be making a partition a substitute for ejectment.¹ Nor can a person who owns an interest in a land syndicate, where the land is vested in trustees, with power of division and sale which contemplate a division in the proceeds, have partition.² A guardian may appear for his ward and do anything respecting the partition the same as the ward could if he were of age or of sound mind;³ and the same rights are extended to a foreign guardian.⁴ All interested persons ought to be made parties,⁵ such as reversioners and life tenants.⁶ It is held, however, that a wife of a tenant in common is not a necessary party, as her inchoate right of dower is divested by a sale;⁷ nor an administrator of a deceased party, unless an accounting of rents is desired.⁸

Sec. 955. Proceedings, where had.—The proceedings must be instituted in the county where the estate is situate,⁹ unless it be in two or more counties, in which case it may be had in any county wherein a part of the estate is located.¹⁰ The proceedings must be instituted in the court of common pleas.¹¹ And an action to set aside a decree for partition should be brought in the county where the land lies.¹²

Sec. 956. The petition.—The petition must set forth the nature of the title of the plaintiff;¹³ and the statute is complied with if it avers that the plaintiffs and defendants are the owners in fee-simple and the tenants in common of the real estate, and that the plaintiff is the owner in fee-simple of the undivided one-fourth and the defendants of the remain-

¹ *Haskell v. Queen*, 21 N. Y. S. 357; *McMurty v. Keifner*, 36 Neb. 522; 54 N. W. Rep. 844 (1893); *Seymour v. Ricketts*, 21 Neb. 240; 31 N. W. Rep. 781.

² *Horner v. Meyers*, 29 W. L. B. 403, citing *Sparling v. Parker*, 9 Beav. 450; *Mallory v. Russell*, 71 Ia. 68; *Ward v. Davis*, 8 Sandf. 502.

³ R. S., sec. 5772; *Merritt v. Horn*, 5 O. S. 307.

⁴ O. Code, sec. 5773.

⁵ *Milligan v. Poole*, 35 Ind. 64.

⁶ *Bell v. Adams*, 81 N. C. 118; *Morgan v. Staley*, 11 O. 389.

⁷ *Weaver v. Gregg*, 6 O. S. 547.

⁸ *Scott v. Guernsey*, 43 N. Y. 106. See *Speer v. Speer*, 14 N. J. Eq. 240.

⁹ R. S., secs. 5022-23.

¹⁰ O. Code, sec. 5755.

¹¹ O. Code, sec. 5756.

¹² *Bent v. Maxwell Co.*, 3 West Coast Rep. 8 (N. M.).

¹³ O. Code, sec. 5756; *Morton v. Outland*, 18 O. S. 383. Not only the title of the plaintiff, but that of the defendant as well. *Ramsey v. Bell*, 42 Am. Dec. 163; *Harman v. Kelly*, 14 O. 502; 45 Am. Dec. 557; *Canal Co. v. Bruly*, 45 Tex. 6. The title of the several tenants must be truly stated and sustained by proof. *Harman v. Kelly*, *supra*.

ing three-fourths thereof.¹ It is not necessary, however, to specially set forth the manner in which the title was derived;² but where a plaintiff proceeds to show in his pleading how he acquired title he must state all the facts necessary to vest title in himself.³ The code provides that where title came by descent or devise, a partition cannot be ordered within a year from the death of the ancestor, unless the petition shall set forth that all the debts have either been paid or secured⁴ or that the personal property is sufficient to pay the same.⁵ An allegation that the defendants have received all the rents and profits, and refused to pay the plaintiff, does not show a hostile title.⁶ It has been held that titles are not decided or created in partition proceedings,⁷ and that only legal titles will be considered, any equities existing in the premises not being prejudiced;⁸ and that suit should not be brought under the statute where the title is in controversy, although under certain circumstances the action may be retained and the parties required to settle the controversy at law before the decree will be rendered.⁹ Under former statutes it has been held that neither a statutory partition nor legal title was necessary to sustain it, and that a person holding an equitable title should pursue an equitable partition.¹⁰ Other courts adopt the rule that the legal and equitable rights may all be settled in one action,¹¹ and this is the usual practice. As shown in a subsequent section, the defendant may deny the plaintiff's title, and such disputes may be settled in the action.¹²

¹ *Pipes v. Hobbs*, 88 Ind. 43; *Balem v. Jacquelin*, 23 N. Y. S. 193.

² *Blakely v. Boruff*, 71 Ind. 98.

³ *Bell v. Dangerfield*, 26 Minn. 307.

⁴ As provided in R. S., sec. 6146.

⁵ R. S., sec. 5756, as amended 88 O. L. 151. The right of the heir-at-law to prosecute partition immediately upon the death of the ancestor is denied for the period of one year, unless it will not interfere with the right of the administrator; that is, the right of the latter to sell the real estate for the payment of debts. *Swihart v. Swihart*, 7 O. C. C. 838. The amended section 5756 should be construed in connection with Re-

vised Statutes, section 6146, for the reason that the security mentioned in section 5756 is the security provided for in section 6146. *Smith v. Montag*, 32 W. L. B. 153 (C. S. C. 1894). But see *Fryman v. Fryman*, 8 O. C. C. 91.

⁶ *Bolen v. Jacquelin*, 22 N. Y. S. 193.

⁷ *Tabler v. Weisman*, 2 O. S. 207.

⁸ *Williams v. Van Tuyl*, 2 O. S. 336.

⁹ *Delaney v. McFadden*, 7 W. L. B. 267.

¹⁰ *Byers v. Wackman*, 16 O. S. 440; *Harman v. Kelly*, 14 O. 502.

¹¹ *Martindale v. Alexander*, 26 Ind. 104.

¹² See sec. 961, *post*; *Emery v. Darling*, 50 O. S. 160; O. Code, sec. 5756.

The petition must set forth a pertinent description of the premises¹ with reasonable certainty.² A general description such as will identify the property, sustained by proper proof, has been held sufficient.³ And each tenant in common, coparcener or other interested person should be named as defendants.⁴ It is essential that the interest of all persons should be specifically and particularly set forth,⁵ and a petition is subject to a demurrer if it fails to meet this requirement.⁶ It must be averred that the parties had an interest at the time of the commencement of the suit.⁷ One tenant in common may recover from another his share of rents and profits received by such tenant from the estate, which may be included in the petition for partition.⁸ Religious denominations, and other societies or associations which have acquired title to real estate, are authorized to file a petition for the partition of their property.⁹ The pleadings in partition in which several parties are joined should be verified by each party.¹⁰

Sec. 957. Form of petition in partition.—

The plaintiff has a legal right to, and is seized in fee-simple as an heir at law of C. P., deceased, of the one undivided — part of the following described real estate, situate in the county of —, and state of Ohio, in the township of —: [Description.]

The said defendants are tenants in common with plaintiff in said premises. One-fourth of said premises belongs to R. T., who is a sister of the deceased, and who intermarried with G. T., and resides in the state of C.

One-fourth belongs to M. E. D., who is a sister of the deceased, and who intermarried with D.

One-eighth belongs to W. P., who is a son of S. P., deceased, who was a brother of C. P., intestate.

One-eighth belongs to A. P., daughter of S. P., deceased, aforesaid, and who lives in —; and one-eighth belongs to E. N. E., daughter of C. E., deceased, who was a sister of the

¹ O. Code, sec. 5756.

² Miller v. Miller, 16 Pick. 215.

³ Thurston v. Minke, 32 Md. 571.

⁴ O. Code, sec. 5756.

⁵ Miller v. Sharp, 48 Cal. 394;

Hanner v. Silver, 2 Oreg. 336; Moren-

hout v. Higuera, 32 Cal. 289-295.

⁶ Rogers v. Miller, 48 Mo. 378;

Wintermute v. Reese, 84 Ind. 308;

Broad v. Broad, 40 Cal. 493.

⁷ Brown v. Brown, 32 N. E. Rep.

1128 (Ind., 1898); Wintermute v.

Reese, 84 Ind. 308.

⁸ O. Code, sec. 5774; West v. Weyer,

46 O. S. 66.

⁹ R. S., secs. 5775-5777.

¹⁰ Caldwell v. Breshetto, 25 W. L. B.

78. See White v. Freese, 2 C. S. C. R.

30-32.

said C. P. [*If husband or wife has dower interest, so state and make them parties.*]

[Plaintiff further avers that all of the debts and claims against the estate of the said C. P., deceased, have been paid,—[or secured to be paid], [or that the personal property of said C. P., deceased, is sufficient to pay all the debts and claims existing against the estate of the said C. P., deceased.]

The plaintiff prays that by an order of the court his interest in said premises may be set off to him in severalty, if the same can be done without manifest injury; if not, then that the premises be sold according to law, and that partition be made, and for such proceedings in the premises as are authorized by law.

NOTE.—A petition without the averment as to payment of debts, would be good, but without the averment, partition can not be ordered within one year from the death of the ancestor. *Fryman v. Fryman*, 9 O. C. C. 91.

Sec. 958. Allegation requiring account for rents and profits.—

The plaintiff further alleges that since he and the defendants have owned said premises in common, to wit, since the — day of —, 18—, the defendant C. D. has received all the rents and profits arising therefrom. That on the — day of —, 18—, the plaintiff requested said defendant C. D. to account to him for said rents and profits so received by him, which he wholly failed and refused to do. That plaintiff cannot state the exact amount of such rents and profits so received by said C. D., but to the best of his knowledge and belief they exceed \$—.

Plaintiff therefore asks that an accounting be made of the rents and profits of said premises from the said — day of —, 18—, to the date when the partition shall be made.

Sec. 959. The order and proceedings thereunder.—The order is directed to the sheriff of the county, commanding him that, by the oaths of the commissioners appointed, he cause the premises to be set off and divided between the parties in interest in such a manner as will be most advantageous and equitable, the improvements, situation and quality of the different parts being taken into consideration.¹ If the premises can not be partitioned without manifest injury, an appraisement must be made and returned to the court. It is not necessary to embrace this order in the writ.² Upon approval of the return of the order, one or more of the parties may elect to take the premises at the appraised value;³ and if no such election is made, an order for the sale by the sheriff may then be made.⁴ The report of the commissioners need not be unanimous, a majority being binding.⁵

¹ O. Code, sec. 5759. As to commissioners' duty when more than one tract is to be partitioned, see sec. 5760.

² *Ellis v. Hicks*, 11 W. L. B. 275.

³ O. Code, sec. 5762.

⁴ O. Code, sec. 5764.

⁵ *Nichols v. Balser*, 1 O. C. C. 47; *Freeman on Part.*, sec. 523.

Sec. 960. Amicable partition.— Before a writ of partition is issued the parties may appear in court and consent to a partition of the estate agreeably to the prayer and facts set forth in the petition, which when made and recorded shall be valid and binding between the parties.¹ A parol partition, if fair, is binding where there has been a long acquiescence and acts of confirmation on the part of the parties,² or when followed by due execution.³

Sec. 961. Partition—Defenses.— The pleadings in partition are like those in other actions. A defendant may, when the petition fails to make the necessary averments as to title or interest or names of the tenants, file a demurrer thereto.⁴ It is equally essential that a defendant set forth the nature and extent of his interest in the same manner in which the plaintiff is required to do.⁵ An answer denying that the plaintiff has any title in the premises does not oust the jurisdiction of the court, as such disputes may be tried and determined in the proceeding,⁶ and the respective interests of the parties settled,⁷ though this is disputed.⁸ An answer which alleges that the boundaries of the land are not sufficient to locate it, and that therefore no title passed, is a frivolous defense.⁹

Sec. 962. Answer setting up interest and joining in prayer.—

And now the defendants, A. P. (who, since the commencement of this suit, has intermarried with one G. L. and is now A. L.) and W. H. P., come and, for an answer to the petition of the plaintiff, say that they admit that they are tenants in common with the plaintiff and their co-defendants as set forth in said petition, and have a legal right to, and are seized in fee-simple, as heirs at law of C. P., deceased, who died intestate, seized of the premises in said petition described, and in the

¹ R. S., sec. 5761.

² Docktermann v. Elder, 27 W. L. B. 195.

³ McKnight v. Bell, 21 Pittsb. L. J. 18; 24 W. L. B. 378.

⁴ Broad v. Broad, 40 Cal. 493; Rogers v. Miller, 48 Mo. 378; Wintermute v. Reese, 84 Ind. 308.

⁵ Freeman on Partition, sec. 499.

⁶ Perry v. Richardson, 27 O. S. 110; Hogg v. Beerman, 41 O. S. 81; Gage

v. Reid, 104 Ill. 509; Forder v. Davis, 88 Mo. 115; Gore v. Dickinson, 11 So. Rep. 743 (Ala., 1892).

⁷ Emery v. Darling, 50 O. S. 160; Morenhout v. Higuera, 82 Cal. 289; Bollo v. Navarro, 88 Cal. 465. See sec. 966, *post*.

⁸ Freeman on Partition, sec. 502.

⁹ Atkinson v. McIntyre, 90 N. C.

proportion stated in said petition, and they also ask that their interest in said premises may be partitioned as prayed for in said petition, except that they ask that the one-fourth interest of said R. T. may be partitioned among her children and heirs at law, said L. S., M. H. and T. G. S., each of an undivided one-twelfth part thereof, and that they may have all other and further relief in the premises.

P. & R., Attorneys for Defendants.

Sec. 963. Answer of guardian ad litem.—

Now comes T. S. W., heretofore appointed guardian *ad litem* of T. G. S., minor heir of R. T., deceased, and, for his separate answer on behalf of his said ward says that he has no knowledge of the matters and things set forth in the petition of said plaintiff, and the allegations contained in the cross-petitions filed in said cause, wherefore he denies the same and demands the proof.

T. S. W., Guardian ad Litem.

NOTE.—See *ante*, sec. 954, p. 924, n. 3.

Sec. 964. Answer setting up advancements made.—

[*Caption.*]

That on the — day of —, 18—, at —, one A. B., the father of the parties to this action, died intestate, leaving no wife surviving him, the owner in fee-simple and in possession of the real estate described in the petition, leaving the parties hereto his only children and heirs at law.

That he owned no other property at the time of his death.

That on the — day of —, 18—, said A. B. conveyed to the plaintiff the following real estate in the county of —, state of — [*describe it*], as an advancement to plaintiff and in full of his interest in his estate, and plaintiff accepted the same as such advancement in full of his interest of any and all property that might be owned by said R. F. at his death.

[*Or, if not in full of his interest, say:* That the real estate (*or other property, if so*) so conveyed to plaintiff was of the value of — dollars, which sum should be deducted from his distributive interest in the whole estate.]

Wherefore they ask judgment that said real estate [*or, sum of — dollars*] be taken into account in arriving at the interest of the parties in said real estate, and that the same be partitioned accordingly.

NOTE.—Advancements should be specially pleaded. *Kepler v. Kepler*, 2 Ind. 363; *Dill v. Webb*, 61 Ind. 85. Advancements paid to a deceased son should be charged to the children of such deceased son. *Parsons v. Parsons*, 52 O. S. 470.

Sec. 965. Answer claiming interest under will.—

Now comes M. H., L. S. and T. G. S., and file herein their joint answer as follows, to wit:

The said defendants say that they are the grandchildren of

R. T., deceased, defendant herein, who died on or about the — day of —, 18—, leaving a will which was duly admitted to probate in said county on the — day of —, 18—; and that under and by said last will and testament they are each seized of an undivided third interest in the estate of inheritance of their said grandmother, in the lands in the plaintiff's petition described.

These defendants further say that they are the heirs at law of A. C. P., deceased, who at the date of her death was seized of an interest and estate in the lands in the plaintiff's petition described; and as such legal heirs of the said A. C. P., deceased, they are entitled to an undivided third interest in said estate.

Wherefore said defendants ask that their said interest in said premises may be protected, and that at partition or sale of the same they may be set off or paid their said interests, and for all other relief proper.

Sec. 966. Answer and cross-petition claiming title to premises under a contract of purchase from decedent.—

And now comes the defendant, M. E. D., and for her answer to the petition of the plaintiff, H. P. E., and to the answer and cross-petition of A. L. and W. H. P., and to the answer and cross-petition of L. S., M. H. and T. G. S., says that neither the said plaintiff nor any of the said defendants are the owners of the said real estate in the said petition described, or of any interest therein, in the lands and tenements in the petition described, and are not entitled to have partition of the same; that, while the said A. C. P. died seized of the legal title to the said premises in the said petition described, and the legal title is now apparently in the plaintiff and defendants and in this defendant as the heirs at law of the said A. C. P., deceased, still this answering defendant is the sole owner thereof, and is entitled to have the legal title thereof conveyed to her for the reasons following:

That on or about the — day of —, 18—, while the said A. C. P. was in full life, at the special instance and request of the said A. C. P., this defendant for a good and valuable consideration purchased from the said A. C. P. the said farm by a written agreement of that date, by the terms of which this defendant was to live with the said A. C. P. as long as the said A. C. P. required, and to have said real estate at the death of the said A. C. P., the same being the real estate then owned by said A. C. P., and the only real estate of which she died seized, and being the same upon which she then resided; and the said defendant avers that she fully performed the said agreement on her part and continued and did live with the said A. C. P. continuously as long as she required, and up to and until her death, and under and by virtue of said agreement worked and labored for her continuously

from said date and long prior thereto and up to and until her decease, and nursed and cared for her in her sickness, and has made lasting and valuable improvements on said farm, and went into possession thereof under and by virtue of said agreement, and ever since has been and is now in possession of the said premises, under and by virtue of the said agreement.

This defendant therefore asks that the said plaintiff and the said defendants, heirs at law of said A. C. P., deceased, be required by the judgment and decree of this court to convey the same to this defendant, or in default of such conveyance said decree shall operate as such conveyance. And she also asks that, if the same cannot be done, she be adjudged and decreed the value thereof in money. And she also asks such other, further and different judgment, order and decree, and such other, further and different relief, as in law or in equity she may be entitled to have.

O. & F., Attorneys for Defendant.

NOTE.—From *Emery v. Darling*, 29 W. L. B. 228; s. c., 50 O. S. 160. A contract in writing made by one sister to another to "give and bequeath" to the latter all her property, upon condition that she would reside with her as long as she desired, carried into execution, upon the death of the former makes the latter the equitable owner entitling her to a conveyance. *Id.* See 3 Parsons on Cont. 406; Waterman on Specific Perf., sec. 41. Such an agreement, if based on sufficient consideration, is valid. *Wright v. Tinsley*, 80 Mo. 389. And it is not essential that it be clothed in technical and precise terms. *Sutton v. Hayden*, 62 Mo. 101. See *Johnson v. Hubbell*, 10 N. J. Eq. 532; *Bolman v. Overall*, 80 Ala. 451; 60 Am. Rep. 107; *Parsell v. Stryker*, 41 N. Y. 480; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Sharkey v. McDermott*, 60 Am. Rep. 270; *Schouler on Wills*, secs. 452-4.

In support of this form, see *ante*, sec. 961, notes 6, 7.

Sec. 966a. Election to be endowed out of proceeds of sale.—In a partition proceeding when the estate can not be divided and is ordered to be sold, the widow or widower of any decedent having a dower interest therein, being a party, may file an answer, waiving the assignment of dower by metes and bounds and ask to have the same sold free of dower and to have allowed, in lieu thereof, such sum of money out of the proceeds of the sale as the court deems the just and reasonable value of the dower interest therein.¹

Sec. 966b. Costs and counsel fees.—The statute provides that the court having regard to the interest of the parties and the benefit each may derive from the partition, and according to equity, may tax the costs and expenses which accrue in the action, including reasonable counsel fees which shall be paid to plaintiff's counsel or other counsel for services rendered for the common benefit of all parties.² Services for which an allowance may be made to other counsel and taxed as costs in the case, must be of like character with the costs, expenses and counsel fee authorized to be taxed in favor of plaintiff's counsel. For services rendered in litigation between parties to such suit, no allowance can be made by the court.³

¹ R. S., sec. 5719; 91 O. L. 35. See *ante*, sec. 533.

² R. S., sec. 5778.

³ *Young v. Stone*, 55 O. S. 125.

CHAPTER 69.

PARTNERSHIP.

Sec. 967. Actions by partnerships.

968. Formal averment of partnership as plaintiff.

969. Actions between partners.

970. Petition to collect amount due from members of partnership — for an accounting and appointment of master.

971. Petition for dissolution of partnership and for an accounting.

972. Petition by one partner for amount due on accounting.

Sec. 973. Actions against partnerships.

974. Formal averment when partnership is a defendant.

975. Petition by judgment creditor to subject the interest of one partner to the payment of judgment and for receiver.

976. Defenses by partnership.

977. Defenses by one partner.

Sec. 967. Actions by partnerships.—A partnership is permitted under the code to sue in its ordinary firm name, without giving the names of its individual members.¹ It is an elementary principle in pleading, that where a statute, upon certain conditions, confers a right, or gives a remedy unknown at common law, the party asserting the right or availing himself of the remedy must in his pleading bring himself, or his case, clearly within the statute.² The rule has been adopted that a domestic partnership must bring itself clearly within the provision, and must state that it is a company or partnership formed for the purpose of carrying on business within the state.³

A foreign partnership can not sue by favor of the statute, but must sue in the individual names of its members.⁴

Some courts have held that where the names of the partners are given in full in the title as partners, it is sufficient to allege the fact of partnership, without repeating their names in the body of the petition.⁵ This view is based upon the principle that the code does not favor a technical construction, and if a cause of action be substantially alleged it will be sufficient.⁶ Others hold that a designation in the title of persons doing business under a firm name, without any statement in the body of the

¹ O. Code, sec. 5011.

² Haskins v. Alcott, 13 O. S. 210.

³ Haskins v. Alcott, 13 O. S. 210; Railroad Co. v. Dick, 7 Neb. 242.

⁴ Brownson v. Metcalf, 1 Handy 188; Critchell v. Cook, 2 W. L. B. 97.

⁵ Adams Ex. Co. v. Harris, 120 Ind. 73; Walter v. Godshall, 32 S. C. 187; 10 S. E. Rep. 951 (1890);

Bischoff v. Blease, 20 S. C. 462.

⁶ Harle v. Morgan, 29 S. C. 258.

petition, is not a compliance with the code, but merely states that they are co-plaintiffs and not partners.¹ An objection that the names do not appear in the body of the petition, made after the admission of plaintiff's evidence, is unavailing.² A petition in which the plaintiffs are set out as W. M. & Co., a partnership doing business in the state of I., was held bad on a motion to dismiss.³ The correct mode of pleading is to aver the existence of the partnership in the body of the petition that it is a partnership formed for the purpose of doing business in Ohio.⁴ A firm doing business under the name of one only of the partners may sue by their partnership name upon a contract made to such partner individually, where it is understood by the contracting parties that it was a firm contract.⁵ An action brought in the name of a firm as J. H. B. & Co. is not subject to demurrer for want of legal capacity to sue, as one of them at least has that capacity.⁶ All partners are necessary parties when the action is brought in the firm name,⁷ and if any are omitted it must appear by averment that their legal obligations have ceased.⁸ A managing partner has no legal right to bring an action in his own name for the recovery of a firm debt.⁹ A surviving partner may sustain an action upon a partnership claim without joining the personal representatives of the deceased partner,¹⁰ the suit being conducted as surviving partner and not in his own right.¹¹ An averment by a surviving partner that a note was made and delivered to plaintiff as surviving partner in the firm name is sufficient to maintain the action.¹² An action which is brought in the name of H. G., A. T. and M. G., late

¹ Lee v. Orr, 70 Cal. 898.

² Simonton v. Rohm, 14 Colo. 51; 23 Pac. Rep. 86.

³ Weisz v. Davey, 28 Neb. 566; 44 N. W. Rep. 470. See McGregor v. Hubbs, 125 Ind. 497; 25 N. E. Rep. 59.

⁴ Beers & Co. v. Gurney, 14 O. C. C. 82; 7 Oh. Dec. 411; Fryer v. Breeze, 16 Colo. 323; 26 Pac. Rep. 817.

⁵ Beakes v. D'Cuhna, 126 N. Y. 293; 27 N. E. Rep. 251 (1891).

⁶ Brookmeyer v. Rosey, 34 Neb. 227.

⁷ Choteau v. Raitt, 20 O. 132.

⁸ Hyde v. Van Valkenburg, 1 Daly,

416. Although it is held that a dormant partner is not a necessary party. Keesey v. Old, 21 S. W. Rep. 698 (Tex., 1893). *Contra*, Secor v. Keller, 4 Duer, 416. But after the death of an ostensible partner, a surviving partner may sue alone on a partnership contract. Beach v. Hayward, 10 O. 455.

⁹ Brainard v. Bertram, 5 Abb. N. C. 102.

¹⁰ Daby v. Ericason, 45 N. Y. 736.

¹¹ Reeder v. Sayre, 70 N. Y. 180.

¹² Manning v. Smith, 16 Nev. 85.

partners under the firm name and style of G. T. & Co., is not brought under the statute, and hence it is not necessary to state that it was formed for the purpose of carrying on trade or business in the state.¹

To enable a partnership to sue under the statute in the usual and ordinary name which it has assumed, it must be an association with certain incidents recognized by law for the convenient transaction of legitimate trade and business; and if formed for an illegal purpose or one contrary to public policy, it has no right under the statute to sue by the name assumed in its business; it is not a partnership within the meaning of the statute.*

Sec. 968. Formal averment of partnership as plaintiff.

Plaintiff avers that it is a partnership formed for the purpose of doing business in Ohio, and is engaged in the business of — in the city of —, county of —, in said state.

NOTE.—O. Code, sec. 5011. See sec. 969, *post*; *Brownson v. Metcalf*, 1 Handy, 188.

Sec. 969. Actions between partners.—Ordinarily one partner can not sue his copartner at law when the suit has reference to partnership affairs. But an action may be maintained in such a case for the recovery of an amount claimed to be due upon a settlement of partnership accounts, or where there has been a special promise by the defendant partner to pay an ascertained balance.² And in such an action the plaintiff must specially aver a settlement of accounts and a balance struck, or a promise to pay.³ An action, however, may be maintained for a breach of a contract of partnership where the business has not commenced and no accounts are involved.⁴ Or they may sue each other where the obligation is separate and distinct from the partnership business, and may be determined without going into partnership accounts.⁵ Such an action may also be sustained, where there has been a dissolution and settlement of partnership business, for the recovery of a balance due upon an account stated;⁶ and the action accrues upon dissolution, unless there is some agreement fixing the account-

¹ *Smith v. Gregg*, 9 Neb. 212.

² *Goodin v. Armstrong*, 19 O. 44; *Neal v. Greenleaf*, 26 O. S. 567; *Knight v. Hinton*, 11 W. L. B. 199; *Moore v. Gano*, 12 O. 300; *Gibson v. Farina Co.*, 2 Disn. 499. Until there has been a balance struck between partners, an action for contribution in favor of one partner who has paid a firm debt cannot be maintained. *McDonald v. Holmes*, 22 Oreg. 212; 29 Pac. Rep. 735 (1892); *Crossley v. Taylor*, 83 Ind. 337; *Harris v. Harria*, 89 N. H. 52. In the absence

of a settlement, one partner cannot sue another for salary for services rendered the firm. *Stone v. Mattingly*, 19 S. E. Rep. 402 (Ky., 1892). ³ *Torey v. Twombly*, 57 How. Pr. 149.

⁴ *Vance v. Blair*, 18 O. 532.

⁵ *Crater v. Bininger*, 45 N. Y. 545; *Esdaile v. Wuytack*, 11 N. Y. S. 421; 25 Abb. N. C. 474; *Lawrence v. Clark*, 7 Dana, 257.

⁶ *Thompson v. Smith*, 82 Ia. 598; *Wycoff v. Purnell*, 10 Ia. 332; 1 Story's Eq. Jur., sec. 664, and note.

* *Jackson v. Brick Association*, 53 O. S. 303; 1 Lindl. on Part. 91; *Sampson v. Shaw*, 101 Mass. 145.

ing beyond that time.¹ A settlement of accounts cannot be effected in an action of *assumpsit*, unless the partnership was confined to a single transaction or the accounts have been settled and a balance found.² One partner may restrain his copartner from violating his rights under the partnership contract, even though a dissolution is not asked,³ and may prevent him from engaging in competitive business during the term of partnership.⁴ Where one person is a member of two firms, one partner cannot maintain an action at law against the other firm,⁵ the proper remedy in such a case being a proceeding in equity.⁶ If this remedy were not allowed, the creditor firm would be without recourse.⁷

Sec. 970. Petition to collect amount due from members of partnership — for an accounting and appointment of master.—

That on the — day of —, 18—, plaintiff and the defendants [*naming them*] entered into a partnership under the laws of Ohio for the purpose of carrying on the business of [*state what*] in the city of —, county of —, in said state, under and by virtue of a certain written contract, which provided that [*state substance*].

That the capital of said partnership was \$—, of which plaintiff and each of said defendants were to pay and contribute thereto the sum of \$—. That the defendants [*naming them*] have each paid their proportion of said capital, but that the defendants [*naming them*] have not paid their proportion of the capital of said partnership so agreed to be paid, and that there is therefore due from each of said defendants [*naming them*] the sum of \$—, a schedule of which indebtedness is hereto attached as an exhibit.

That said partnership was carried on and continued until the — day of —, 18—, when the object of said partnership was wholly abandoned and the same mutually dissolved.

That no settlement of said partnership accounts has ever been made between plaintiff and defendants, though the plaintiff has repeatedly applied to defendants for a settlement and adjustment of their partnership affairs, but that defendants have wholly failed and refused to either make an accounting

¹ Gray v. Kerr, 46 O. S. 652.

⁵ Newman v. Pittman, 13 S. Rep.

² Elmer v. Hall, 148 Pa. St. 345; 23

412 (Ala., 1893).

Atl. Rep. 971.

⁶ Scnebley v. Culter, 22 Ill. App.

³ Leavitt v. Land Co., 54 Fed. Rep.

87; Schnaier v. Schmid, 18 N. Y. S.

489 (Colo.); High on Injunction, sec.

725; Cole v. Reynolds, 18 N. Y. 74.

1880, and cases cited.

⁷ Haven v. Wakefield, 39 Ill. 509;

⁴ Hallady v. Faurot, 9 W. L. B. 92.

Hall v. Kimball, 77 Ill. 161.

and settlement or to pay the amounts due from them upon the capital of said company.

The plaintiff therefore prays that the court will decree the dissolution of said copartnership, that a special master be appointed to take and state an account between said copartners; that, on the coming in of the report of said master, the court will make an order requiring each and every member of said copartnership to pay the amount that said master may report to be due from them, or each of them, upon his or her capital stock into court; upon failure to comply with such order within a short period to be by the court named, that execution may be awarded against each of them severally therefor, and that the amount so paid in, or collected on execution, be applied to the payment of the claims of these plaintiffs, and in payment of other debts of said copartnership, if any there may be found by said master to exist; and if said amount so collected from said unpaid stock shall be insufficient to pay in full the claims or indebtedness of said copartnership, that the court will then apportion the liability for the amount of said partnership debts, so remaining unpaid, among the solvent partners, as reported by said master, ratably according to the number of shares of capital stock each holds, and order the amount so apportioned on each partner to be paid into court within a short time to be named by the court, and, upon failure of any partner to comply with said order, that execution may issue against him for said amount, and for all such other and further relief as the court may deem just and equitable.

Sec. 971. Petition for dissolution of partnership and for an accounting.—

Plaintiff alleges that on the — day of —, 18—, plaintiff and defendant entered into a partnership for the purpose of [*state for what business and where located*].

That under their contract of partnership it was provided that each partner should furnish an equal amount of capital necessary to carry on and conduct said business, and that if either partner should furnish more money than the other that in that event the partner so furnishing the larger amount of money should be allowed and paid interest for the excess so furnished by him; and that the net profits of said business should be divided equally between them; that in pursuance of said contract plaintiff paid out of his own money, in the business of said partnership [*detail, if necessary*], the sum of \$—, which said sum was contributed and paid in as capital for said business.

That defendant contributed only the sum of \$— to the capital of said partnership, less than his share, and from time to time, during the continuance of said business, applied to his own use from the receipts and profits of said business the

sum of \$——. And plaintiff has good reason to believe, and does believe, that said defendant, on sales made in the course of said business, received a sum much larger than said \$——, and applied the same to his own use, the exact amount of which plaintiff cannot state, thereby greatly increasing his indebtedness to said firm without plaintiff having any means of ascertaining the true state of his accounts.

That on the —— day of ——, 18—, plaintiff and defendant ceased to do business as copartners without any formal dissolution or settlement, and plaintiff has repeatedly requested and demanded an accounting of said defendant, and demanded that he pay over to plaintiff the amount due him, which defendant failed and refused to do and still refuses to do.

Plaintiff therefore asks that said partnership be dissolved and an account taken of all said copartnership dealings; that a receiver be appointed, if found necessary; that the defendant be required to pay his indebtedness to said copartnership; that the plaintiff be paid his capital so contributed to said business, and also his share of the profits thereof, and such other relief as may seem equitable.

Sec. 972. Petition by one partner for recovery of amount due on accounting.—

That on the —— day of ——, 18—, plaintiff and defendant entered into a partnership for the purpose of carrying on business in Ohio.

That they paid in, as capital stock, the sum of —— dollars each, and commenced business on the —— day of ——, 18—, and continued until the —— day of ——, 18—, when the same was mutually dissolved.

That on the —— day of ——, 18—, they had a full and final accounting and settlement of their said business up to said date, and it was found that the defendant was indebted to the plaintiff in the sum of —— dollars. That the debts of said firm have all been paid.

That there is due plaintiff from said defendant said sum of \$——, which he has demanded of him, but that he wholly refuses to pay the same.

Plaintiff therefore asks judgment against said defendant for said sum of \$——, with interest from the —— day of ——, 18—, and costs.

Sec. 973. Actions against partnerships.—The liability of partners has its foundation upon the principle that each partner is the agent of the partnership, which is said to be a true test of partnership, though participation in profits is cogent evidence, but not conclusive of the question of partnership.¹ A partnership formed for the purpose of carrying on busi-

¹ Harvey v. Childs, 28 O. S. 819.

ness within the state may be sued in the usual or ordinary name which it has assumed or by which it is known, without alleging the individual members.¹ But this does not deprive or take away the right to sue them in their individual names.² In fact they may be sued in both ways in the same action.

The same rule as to averments of the organization of a partnership will apply in actions by third persons against a partnership as has been stated in a preceding section.³ This provision of the code, however, is limited to those partnerships formed for the purpose of carrying on business within the state which have a place of business in the county where the action is brought, and does not extend to foreign partnerships.⁴ In bringing an action, therefore, against a foreign partnership, it must be brought in the names of the individual members.⁵ Under this provision a suit may be sustained against an individual who is engaged in business under a firm name by the name which he has assumed, without showing that he alone composes the firm.⁶ Where one person uses a name that implies a partnership, the reputed firm may be sued under such name, and the execution will run against the partnership in name.⁷ An allegation that the defendants, the said A. J. M. & Co., executed and delivered their written obligation, has been held a sufficient allegation of partnership;⁸ and so with a charge that the defendants were engaged in business under a given firm name, and that a note sued upon was executed by them.⁹ An action may be sustained upon a contract made by an individual partner even though the plaintiff knew that such person was one of several partners, and that he acted in their behalf in making the contract.¹⁰ Fraudulent representations by one partner in partnership business bind the firm and create a liability,¹¹ and any one or all of the members may be liable for

¹ O. Code, sec. 5011.

³ So. Rep. 945 (Ala., 1898); Le Grande

² Whitman v. Keith, 18 O. S. 184; v. Bank, 81 Ala. 180; Moore v. Watts, 81 Ala. 265.

³ See ante, sec. 967.

⁴ Harle v. Morgan, 29 S. C. 258; 7 S. E. Rep. 487.

⁵ Brownson v. Metcalf, 1 Handy, 188.

⁶ Critchell v. Cook, 2 W. L. B. 97.

⁷ Rains v. Bolin, 38 N. E. Rep. 218

⁸ O'Brien v. Fogleson, 3 Wyo. 57;

(Ind. App., 1898).

81 Pac. Rep. 1047; Munster v. Cox, 11 Q. B. D. 485.

¹⁰ Clark v. Manuf'g Co., 62 N. H. 612.

¹¹ Peckham Iron Co. v. Harper, 41

⁷ Birmingham Loan Co. v. Bank.

O. S. 100.

a tort committed by an employee.¹ In seeking to charge a special partner as a general one, the petition need not allege an attempt to form a limited partnership, nor the defects which render the special partner liable, it being sufficient to charge him as a general partner.² Where a person loans money to a member of a firm without knowledge that the same was borrowed for the firm, the lender may, on discovering that the firm is the real borrower, maintain an action against it for its recovery,³ although it is held that money borrowed by one partner on his individual credit does not necessarily become a partnership debt though used for partnership purposes.⁴ Upon the death of one partner his personal representative and the surviving partner may be joined.⁵ And where the only member upon whom service has been had dies, the action may be maintained against the surviving partner without making the heirs of the deceased partner parties.⁶ An amendment substituting the individual names of partners requires new service.⁷

A non-resident partnership formed for the purpose of doing business within the state, with a place of business therein, may be sued in attachment by its company name, and service may be had by leaving a copy of the summons at its place of business within the state.⁸

Sec. 974. Formal averment when partnership is a defendant.—

Plaintiff says that the defendant is a partnership organized under the laws of Ohio for the purpose of doing business in said state, and is engaged in the business of [*state what*] at the city of M., county of —, in said state.

¹ *Roberts v. Johnson*, 58 N. Y. 618.

² *Bank v. Strauss*, 17 N. Y. S. 188.

³ *Bank v. Little*, 4 O. C. C. 195.

⁴ *Peterson v. Roach*, 33 O. S. 374;
Bank v. Sawyer, 38 O. S. 339.

⁵ *Weil v. Guerin*, 42 O. S. 299.

⁶ *Davis v. Schaffner*, 22 S. W. Rep. 823 (Tex., 1898); *Frank v. Tatum*, 28 S. W. Rep., 311 (Tex., 1898). Judg-

ment cannot be rendered against one partner upon a firm debt. *Craig v. Smith*, 11 Colo. 220; 15 Pac. Rep. 337; *Dessauer v. Koppin*, 32 Pac. Rep. 132 (Colo. App., 1898); *Breene v. Booth*, 33 Pac. Rep. 1007 (Colo. App., 1898).

⁷ *Marinthal v. Amberg*, 2 Dian. 586; *Dobell v. Loker*, 1 Handy, 574.

⁸ *Byers v. Schlup*, 51 O. S. 300.

Sec. 975. Petition by judgment creditor to subject the interest of one partner to the payment of judgment and for receiver.

[*Formal averment as in ante, sec. 974.*]

Plaintiff alleges that on the — day of —, 18—, he recovered a judgment in a certain action wherein he was plaintiff and the said C. D. was defendant, in the court of common pleas in said county, against the defendant C. D. for the sum of \$—. That plaintiff caused an execution to be issued in said cause against the said defendant C. D., which said execution was levied upon the undivided interest of the said C. D. in the partnership property of the above-named partnership, of which the said C. D. is a member owning an undivided one-half interest therein.

Plaintiff alleges that the defendant C. D. has no other property than his interest in the said partnership property, and that a sale thereof by the sheriff under his said execution, without having said C. D.'s interest therein ascertained, will not realize a sum sufficient to satisfy plaintiff's judgment.

Plaintiff therefore asks that an accounting may be had and taken of the interest of said defendant in the aforesaid partnership, and that such interest, when so ascertained, may be sold to satisfy said plaintiff's judgment, and that a receiver may be appointed to take charge of and manage said property until the interest of said defendant therein shall have been ascertained.

NOTE.—Based on *Nixon v. Nash*, 12 O. S. 647.

Sec. 976. Defenses by partnership.—An action will not lie against a partnership in its firm name alone to recover a penalty prescribed by statute, as a tort committed in violation of a statute is not within the scope of the partnership business.¹ Failure to allege the partnership in the proper manner in the petition should be taken advantage of by demurrer and not by motion.² The omission to make the proper averments necessary to bring a partnership within the favor of the statute is good ground for demurrer, in that the plaintiff has not legal capacity to sue. Unless demurred to upon this specific ground it will be considered as waived; a general demurrer will not raise the question.³ The allegation of partnership in the plaintiff's petition may be put in issue by a denial that the plaintiffs were copartners, as alleged in the petition or otherwise.⁴ It is said that technical objections to an allegation of partnership should be disregarded, and that a petition which contains a substantial allegation of partnership, as well as its name and style of business, will be sufficient.⁵

¹ *Hargo v. Meyers*, 4 O. C. C. 275. 7 Oh. Dec. 411; *Globe Rolling Mill*

² *Monroe v. Williams*, 35 S. C. 372; *v. King*, 2 C. S. C. R. 21; *Beers & Brownson v. Metcalf*, 1 Handy, 188. Co. v. Gurney, 14 O. C. C. 82, 88.

It is waived by failure to demur. ⁴ *Dessaint v. Elling*, 31 Minn. 287. *Haskins v. Alcott*, 13 O. S. 217. See *Contra*, *Hunter v. Martin*, 57 Cal. 365. *Bates on Part*, 1061. ⁵ *Millhiser v. Holleyman*, 16 S. E.

³ *Haskins v. Alcott*, 13 O. S. 210; *Rep.* 688 (S. C., 1892).

Sec. 977. Defenses by one partner.—It is not a good defense by one partner to a suit on a note against a partnership that his copartner executed the same without his consent and without notice to the holder.¹ An answer by one partner that he was induced to enter into a partnership agreement by fraud is not sufficient without the further allegation that he rescinded the same and has sustained damage.² A defense to an action for the recovery of a sum of money claimed to be due by virtue of a partnership contract, that the cause of action is not joint but several, is good.³ A partner who permits another to conduct business, upon the understanding that there was an equality of interest, cannot be allowed, in settling up their affairs, to claim that the contract provided a different mode of division.⁴ In an action against two defendants as late partners upon paper accepted by them as partners, the one cannot charge that the same was accepted by the other for his individual debt, but must deny the execution.⁵ There is no liability created on the part of copartners where an act is performed by a member of a non-commercial partnership without consent and not within the scope of the partnership business.⁶ There seems to be no legal obstacle in the way of permitting one partner to demur to a complaint against the copartnership while the other answers the same upon its merits.⁷ Where two or more partners are residents of different states and suit is brought against a resident, he must answer or plead the interest of the other in the firm, and the partnership property cannot be appropriated to the payment of the debt until they have chosen to wind up the partnership affairs and make a division.⁸ In an action by a surviving partner upon a book account belonging to the firm, the defendant may claim as a set-off an individual account against plaintiff.⁹ But when only one of them is sued he cannot claim a set-off held by him individually.¹⁰

¹ *Moffitt v. Roche*, 93 Ind. 96.

² *Arnold v. Nichols*, 64 N. Y. 117.

³ *Master v. Freeman*, 17 O. S. 823.

⁴ *Keys v. Baldwin*, 19 W. L. B. 376.

⁵ *Palmer v. Scott*, 68 Ala. 380.

⁶ *Toland v. Lutz*, 2 O. C. C. 453.

⁷ *Allison v. Hart*, 9 N. Y. S. 692;
Webb v. Vanderbilt, 89 N. Y. S. 4.

⁸ *Nye v. Rutherford*, 6 W. L. B. 378.

⁹ *Beesley v. Crawford*, 19 O. 126.

¹⁰ *Williams v. Pultzer*, 2 W. L. B.
252.

CHAPTER 70.

PRINCIPAL AND SURETY.

Sec. 978. Sureties — Legal status.	Sec. 985. Answer setting up suretyship and asking that property of principal be first exhausted.
979. Compelling creditor to sue.	
980. Action by surety.	
981. Petition by surety to secure the right of subrogation as to real property levied upon under judgment against principal.	986. Answer by surety that time has been extended by payee.
982. Petition to be subrogated to mortgage lien.	987. Answer that property of principal has been released by debtor.
983. Petition by surety to compel principal to pay note.	988. Answer that surety signed note on condition.
984. Sureties — Defenses.	989. Answer of failure to sue principal when notified.

Sec. 978. Sureties — Legal status.— Sureties are favored persons in the eye of the law. Their contracts are strictly construed and cannot be extended beyond the very letter.¹ And where parties have knowledge that those who have executed a contract are in fact sureties, their rights cannot be waived though the contract provides to the contrary.² The surety is not damnified until judgment has been rendered against him, nor can a creditor, holding an indemnity, be substituted to his rights where no judgment has been rendered against either principal or surety, or where there is no allegation that either is insolvent.³ And where a surety holds an indemnity limiting his liability to a deficiency after foreclosure and sale, the fact of foreclosure and sale is a condition

¹ McDowell v. Reese, 20 W. L. B. contracts. Walsh v. Miller, 51 O. S. 102; People v. Chalmers, 60 N. Y. —.

154. While sureties are not liable beyond the plain terms of their agreement, the rules governing the interpretation of their contracts are not different from those applicable in the construction of all written

² O. Code, sec. 5832.

³ Ohio Life Ins. Co. v. Reeder, 18 O. 35; Grant v. Ludlow, 8 O. S. 20; People's Ins. Co. v. Straehle, 2 C. S. C. R. 186.

precedent to a right of recovery against him.¹ In actions against a surety for a breach of the principal, it is generally not necessary to allege a violation on the part of the surety, as the latter is liable only upon failure of the principal.² Nor is it necessary to aver that the promise was in writing.³

Sec. 979. Compelling creditors to sue.—As a means of protecting sureties the code has provided that, when a right of action accrues against the principal, the surety may give notice in writing to the creditor requiring him to commence an action against the principal, relieving him from his obligation if the creditor fails to prosecute the action with due diligence.⁴ While it is provided that the notice shall be in writing, no particular form is prescribed; a substantial compliance with the code will answer.⁵ The notice, however, must be an unconditional requirement to commence an action forthwith.⁶ A personal representative of a surety may take advantage of this provision of the code as well.⁷ To entitle a surety to the benefit of this provision it is not necessary that the fact of suretyship appear on the face of the instrument.⁸ A surety desiring to avail himself of the fact that he has given the statutory notice requiring the creditor to sue must specially plead the same.⁹ It must be averred that the notice was in writing.¹⁰

Sec. 980. Action by surety.—A further remedy is provided in the interest of the surety allowing him to bring an action against his principal to compel him to discharge the debt or liability for which the surety is bound, after the same becomes due.¹¹ This provision simply carries out the equitable rule which existed before the adoption of the code.¹² A legal rep-

¹ *Beebe v. Canney*, 55 N. W. Rep. 61 (Minn., 1893).

² *Farley v. Moran*, 81 Pac. Rep. 158 (Cal., 1892).

³ *Walker v. Richards*, 39 N. H. 259; *Marston v. Swett*, 66 N. Y. 207.

⁴ O. Code, sec. 5833. See sec. 982, *post*.

⁵ *Clark v. Osborne*, 41 O. S. 26; *Meriden S. Plate Co. v. Flory*, 44 O. S. 430; *Iliff v. Weymouth*, 40 O. S. 101.

⁶ *Baker v. Kellogg*, 29 O. S. 663; *Porter v. Bank*, 54 O. S. 155.

⁷ O. Code, sec. 5834. Not applicable to sureties on official bond.

⁸ *Meriden S. Plate Co. v. Flory*, 44 O. S. 430.

⁹ *Headington v. Kneff*, 7 O. (part 1), 239; *Shehan v. Hampton*, 8 Ala. 942.

¹⁰ *Mendell v. Cairnes*, 84 Ind. 141. *Contra*, *Coates v. Swindle*, 55 Mo. 81. But the statutory requirement should appear by the pleading to have been complied with.

¹¹ O. Code, sec. 5845; *Barber v. Bank*, 45 O. S. 134.

¹² *Horst v. Dagque*, 34 O. S. 875; *Hayes v. Ward*, 4 John. Ch. 123.

representative of the surety is also permitted to bring this action on behalf of the estate.¹ A surety cannot go into court for relief either against the creditor or debtor until after the debt is due.² After judgment rendered, a surety may, without making any payment himself, proceed in equity against the principal to subject any property belonging to him to the payment of the debt,³ and in a proper case may sustain an attachment against the principal debtor.⁴ Payment in small sums at different times does not give a right of action for each separate payment without notice or demand.⁵ Several sureties who have paid the debt of their principal cannot maintain a joint action, as the presumption is that each paid only his proportionate share, and their right of action is several.⁶ Although sureties are not permitted to join in an action at law against their principal for the recovery of money advanced by them, they must do so in a suit in equity to be subrogated to the rights of creditors.⁷ A surety on an official bond may join with his co-sureties for contribution.⁸ Upon the decease of a partner, a surety for the firm who has paid the debt may, where the surviving partner is insolvent, proceed in equity against the estate of the deceased partner without first bringing an action against the surviving partner.⁹

Sec. 981. Petition by surety to secure the right of subrogation as to real property levied upon under judgment against principal.—

On the — day of —, 18—, in the court of common pleas of — county, Ohio, at the — term thereof, in said

¹ *Bank v. Trimble*, 40 O. S. 629; *Peabody v. Chapman*, 20 N. H. 418; *Barber v. Bank*, *supra*.

² *Hinkley v. Pfeister*, 88 Wis. 64; *See Dussol v. Branguriere*, 54 Cal. 53 N. W. Rep. 21; *Brandt on Suretyship*, secs. 228-229. Except for the purpose of obtaining indemnity against the debt or liability for which he is bound, whenever any of the grounds for an arrest or attachment exist. R. S., sec. 5846.

³ *Hale v. Wetmore*, 4 O. S. 600, citing *Stump v. Rogers*, 1 O. 533; *Horse v. Heath*, 5 O. 355; *McConnell v. Scott*, 15 O. 401.

⁴ *Brannin v. Smith*, 2 Disn. 436.

⁵ *Williams v. Williams*, 5 O. 444.

⁶ *Lombard v. Cobb*, 14 Me. 222;

Chandler v. Brainard, 14 Pick. 287. Although where the judgment is joint they must all join. *Littner v. Horsey*, 2 O. 209; *Peabody v. Chapman*, 20 N. H. 418.

⁷ *Sevier v. Roddie*, 51 Mo. 580; *Neilson v. Fry*, 16 O. S. 552; *Bunker v. Tufts*, *supra*. Even though the judgment has been extinguished. *Neilson v. Fry*, *supra*.

⁸ *Cunent v. Thompson*, 2 C. & C. R. 54.

⁹ *Horse v. Heath*, 5 O. 353.

year, the said defendant, The L. National Bank, recovered a judgment against the defendant D. C. W., and the above-named plaintiffs J. S. and J. E., for the sum of — dollars, which judgment is still in full force. That said judgment was taken upon a promissory note to which there was attached a warrant to confess judgment; that said promissory note, with said warrant attached, was signed by D. C. W. as principal, and the above-named plaintiffs, J. S. and J. E., as sureties for the said D. C. W., which said suretyship was well known to said defendant, The L. National Bank. That said D. C. W. is now, and was at the time said judgment was taken as aforesaid, wholly insolvent. That said judgment became and was a lien on said — —, 18—, on the undivided one-sixth part of the following described real estate, situated in the county of —, state of Ohio, to wit: [*description*], the above described premises being subject to the life estate of A. R.

That on the said — day of —, 18—, execution was duly and legally issued on said judgment and placed in the hands of M. P. H., sheriff of said county, and the same was levied on the above real estate on the — day of —, 18—. That on the — day of —, 18—, plaintiffs, in order to save their property from being levied upon and exposed to sale, were compelled to and did pay said judgment in full as sureties.

That said judgment was taken on said note and warrant to confess judgment without any notice to the plaintiffs, and that they had no opportunity to make application to the court to be certified in said judgment as such sureties aforesaid. That the said defendant, through its attorney, refused to allow the above real estate to be sold by the said sheriff and apply the proceeds thereof on said judgment. The said bank did, on the — day of —, 18—, assign the said judgment to these plaintiffs as such sureties as aforesaid.

Plaintiffs therefore ask that they may be subrogated to all the rights of the plaintiff in said judgment, for the protection and security for the amount of money paid by them for the said D. C. W., and that said real estate may be ordered sold and the proceeds applied to the payment of said judgment, and for such other and further relief as they may be entitled to in the premises.

M. A. H., Attorney for Plaintiffs.

NOTE.—From *Lima Nat. Bank v. Stiles*, 27 W. L. B. 64. Judgment of lower court affirmed. Petition prevailed.

Ordinarily the right of subrogation cannot be enforced until full payment. *People's Ins. Co. v. Straehle*, 2 C. S. C. R. 186. A surety may sustain an action to be subrogated even though the judgment be extinguished. *Neilson v. Fry*, 16 O. S. 352. And may have dormant judgment revived and enforced against principal debtor. *Neal v. Nash*, 28 O. S. 483. Where a right of subrogation exists, a defendant may, on cross-petition, bring in those against whom a cause of action would arise in his favor, to enforce payment of such debt. *Resor v. McKenzie*, 2 Disn. 210. An insurer paying

loss from a peril insured against may be subrogated to all claims against one whose negligence caused the injury—but not applicable where the negligence of insured was the cause. *Insurance Co. v. Sherlock*, 25 O. S. 50.

Sec. 982. Petition to be subrogated to mortgage lien.—

That on the — day of —, 18—, the defendant executed a mortgage to A. B. on the following premises situate in — county, state of Ohio. Said mortgage was given to secure the payment of a promissory note then given to said A. B. by the defendant C. D., upon which plaintiff became surety for said C. D., and which was due and payable in one year after date.

That when said note became due and payable the said C. D. failed and neglected to pay the same, and the said A. B. thereupon commenced an action upon said mortgage, and on the — day of —, 18—, said A. B. obtained a decree for the foreclosure of said mortgage and obtained an order for the sale of said real estate to satisfy said judgment.

To prevent a sale of said land plaintiff on the — day of —, 18—, was compelled to and did pay off and discharge said judgment and costs, paying thereon — dollars.

That the defendant C. D. has not repaid plaintiff the said sum of — dollars, nor any part thereof.

Wherefore plaintiff asks judgment against the defendant for — dollars, and that he be subrogated to the lien of said judgment, and that the premises be ordered sold to pay the amount due plaintiff from the defendant.

Sec. 983. Petition by surety to compel principal to pay note.—

Plaintiff states that on the — day of —, 18—, the defendant A. B. and plaintiff made, executed and delivered to the defendant C. D. their certain promissory note of that date for the sum of \$—, payable to the defendant in — years after date, bearing interest at — per cent. per annum, payable annually, due in — years after date.

That the said defendant A. B. executed said note as principal, and this plaintiff signed the same as surety only.

That said note matured on the — day of —, 18—, and is now past due. That the said A. B., principal, has not paid said note nor any part thereof, by reason whereof plaintiff is still liable thereon as surety.

Wherefore plaintiff prays that the defendant C. D. may be ordered, adjudged and compelled to pay off and discharge said note, and for such relief as may be proper.

NOTE.—R. S., sec. 5845, authorizes a surety to maintain this action.

Sec. 984. Sureties — Defenses.—As the principle underlying the relationship of principal and surety is that the surety shall not be called upon to answer for the debt or con-

tract unless the principal has first failed, it is necessary that no undue advantage be taken of the surety. Contracts, therefore, entered into between principal and creditor, to which the surety is not a party and which are injurious to him, may relieve him from his obligation.¹ For instance, where a note has been executed and delivered with only one name thereon as surety, and the name of an additional surety is placed thereon without consent of the first surety, the latter is relieved.² So where the time of payment has been extended to the principal without the knowledge of the surety,³ or where the terms of the contract have been departed from,⁴ or where there has been any material concealment on the part of the creditor, thereby increasing the risk of the surety,⁵ or by delay of the creditor in proceeding against a principal, in which case the surety must show explicit notice or request to sue,⁶ or where there has been a fraud practiced upon the surety,⁷ or where there is no consideration between the surety and principal,⁸ or where a contract between a surety and creditor provides for the retention of security received and there is a departure from the terms of the contract.⁹ A surety on an official bond is entitled to notice of an action thereon, and is not held by a judgment unless he has had an opportunity to defend.¹⁰

While a material alteration of a contract to which the surety did not consent will furnish a complete defense, yet where only his equitable rights or remedies have been invaded, and the original obligation remains the same, he can only be relieved to the extent of actual injury.¹¹ The surety may doubt-

¹ King v. Baldwin, 2 John. Ch. 554. of time and usury may be joined.

² Owens v. Tague, 8 Ind. App. 245. Shed v. Augustine, *supra*.

The signing of additional surety is a new undertaking requiring an independent consideration. Favorite v. Stedham, 84 Ind. 428; Bridges v. Blake, 106 Ind. 382. See generally as to alterations without the consent of sureties, Gardner v. Harvack, 21 Ill. 128; Pelton v. Drescott, 18 Ia. 567; Henry v. Head, 114 Ind. 275.

³ Shed v. Augustine, 14 Kan. 282; Church v. Malloy, 70 N. Y. 63; Mulendore v. Wertz, 75 Ind. 481; 39 Am. Rep. 455. A defense for extension

⁴ Erickson v. Brandt, 55 N. W. Rep. 62 (Minn., 1898).

⁵ Bank v. Albright, 21 Pa. St. 228.

⁶ Howe Mach. Co. v. Farmington, 82 N. Y. 121. See *ante*, sec. 979.

⁷ Graves v. Tucker, 10 S. & M. 9.

⁸ Hartman v. Redman, 21 Mo. App. 124.

⁹ Noble v. Murphy, 91 Mich. 658; Brandt, Suretyship, secs. 370, 373, 375.

¹⁰ Moore v. Kepner, 7 Neb. 291; Saveland v. Green, 36 Wis. 612.

¹¹ Ide v. Churchill, 14 O. S. 372.

less set up a failure of consideration as between the payee and himself, where there is a special consideration between them,¹ and may also show a breach of warranty upon a contract of sale, even though the principal does not avail himself of such defense.² Where sureties guaranty the payment of notes secured by mortgage after their maturity, they cannot be held liable for the payment of any notes transferred by their principal to the obligee in the bond of surety for a consideration other than money paid at the time.³ Nor can a surety set up a defense that a creditor has taken additional security at the time of the execution of a contract for the purpose of showing that he is discharged, as the taking of such security will not of itself relieve the surety, unless it liquidates the debt or changes the liability of the surety.⁴ It has been held that an averment in an answer that the defendant requested plaintiff to sue the principal is sufficient, without a further allegation that the notice was in writing,⁵ although this could not apply where the code plainly provides that it shall be in writing.

Sec. 985. Answer setting up suretyship and asking that property of principal be first exhausted.—

Defendant for his answer herein states that he signed the note set forth in plaintiff's petition only as surety for his co-defendant herein, and did not receive any part of the consideration therefor.

Defendant therefore asks that the execution awarded in said cause may be first levied upon the property of his co-defendant C. D., the principal upon said note, before resorting to the property of this defendant.

NOTE.—How judgment against principal and surety entered. Certificate of suretyship may be made on judgment. R. S., *secs.* 5419, 5534. Consent that a defendant be certified as surety may be made in open court. *Peters v. McWilliams*, 36 O. S. 155. Where sureties neglect to have themselves so certified, the creditor will not be compelled to first exhaust the property of the principal. *Elliott v. Elmore*, 16 O. 27. Yet if a levy which has been made on unincumbered property is abandoned without consent of surety he will be released. *Day v. Ramey*, 40 O. S. 446. Contract construed strictly in favor of surety. *State v. Nutting*, 2 O. 1, 1, 6; *McGovney v. State*, 20 O. 98.

¹ *Jeffrey v. Lamb*, 78 Ind. 202;
Meeker v. Shanks, 113 Ind. 207;
Campbell v. Kates, 17 Ind. 126.

² *Springfield Eng. etc. Co. v. Park*,
3 Ind. App. 178.

³ *Labaree v. Klosterman*, 33 Neb.
150.

⁴ *Springfield Eng. etc. Co. v. Park*
3 Ind. App. 178, citing *Pitman on Prin-*
and Surety, 201; *Brandt on Surety-*
ship, *secs.* 820, 821; *Morgan v. Martin*,
32 Mo. 488.

⁵ *Coates v. Swindle*, 55 Mo. 81.

Sec. 986. Answer by surety that time has been extended by payee.—

[*Caption and formal averments.*]

That on or about the — day of —, 18—, when the note set forth in plaintiff's petition became due, the plaintiff, in consideration that [*state consideration*], and without the knowledge or consent of this defendant, entered into an agreement with the maker and defendant R. F., whereby he extended the time for the payment of said note until the — day of —, 18—, and that thereby and by his said contract of extension aforesaid this defendant has been released therefrom.

NOTE.—See *Bank v. Lucas*, 26 O. S. 335. A contract of extension by the creditor and one surety discharges another surety only from a part of the debt which the first surety would be bound to contribute. *Ide v. Churchill*, 14 O. S. 372.

Sec. 987. Answer that property of principal has been released by debtor.—

[*Caption.*]

Defendant says that he executed the note sued on only as surety for C. D., and received no consideration therefor, of which fact the plaintiff was well aware at the time.

That as an additional security for the payment of said note said C. D. executed a mortgage to the plaintiff upon the following described real estate: [*describe it*], [*or, delivered to the plaintiff as collateral security a note payable to said C. D., and signed by R. L., for — dollars, with U. V. as surety thereon*].

That on the — day of —, 18—, without the knowledge or consent of this defendant, the plaintiff released said mortgage [*or, delivered to said C. D. said note so held as collateral security*].

That said property [*or, note*] has since been disposed of by said C. D., and cannot be reached by execution, and said C. D. is wholly insolvent.

That said property [*or, note*] was of the value of — dollars, and the plaintiff could have realized therefrom the full amount of the note sued on.

Sec. 988. Answer that surety signed note on condition.—

[*Caption.*]

That this defendant signed the note set forth in plaintiff's petition only as surety for C. D., and received no part of the consideration therefor, all of which the plaintiff well knew at the time said note was executed.

That at the time said note was executed this defendant was indebted to R. F. in the sum of — dollars, as surety for said C. D., which was then due.

It was thereupon agreed between the plaintiff, this defend-

ant and said C. D. that in consideration of the execution of the note sued on herein and of this defendant becoming surety thereon, that plaintiff would loan the said C. D. — dollars, which sum should be applied to the payment of the said note to said R. F., thereby releasing this defendant from further liability thereon. Defendant thereupon executed the note sued on in consideration and only upon the condition that the money to be thus procured should be applied upon said note to said R. F., as the plaintiff at the time well knew.

That after this defendant had executed the note sued on, without the consent and knowledge of this defendant [but with the consent of said C. D.], the plaintiff applied the money so loaned to said C. D. to the payment of a note executed by said C. D. to the plaintiff [upon which he had no security], and the said note to said R. F. remains unpaid [*or*, this defendant has since been compelled to pay said note of said R. F.].

Sec. 989. Answer of failure to sue principal when notified.—

Defendant says that the note set forth in plaintiff's petition was signed by him only as surety for his co-defendant C. D., and that he received no part of the consideration therefor whatever, of which fact the plaintiff was well aware at the time.

That when said note so signed as aforesaid matured, to wit, on the — day of —, 18—, this defendant in writing duly notified and demanded that plaintiff immediately bring suit thereon, but that plaintiff did not then bring suit as requested and not until the — day of —, 18—, when this action was commenced.

That by reason of the failure on the part of said plaintiff to bring said suit as requested defendant says that he has been released from any liability upon said note whatever.

NOTE.— R. S., sec. 5833.

A creditor can not be compelled to go through what may become a protracted law suit against the debtor before he can collect the debt from the surety; and failure so to do will not effect a release of the surety.¹

¹ Bank v. Morrison, 7 Oh. Dec. 292.

CHAPTER 71.

PRIVATE CORPORATIONS.

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| <p>Sec. 990. Averment of corporate capacity.</p> <p>991. Form of averment of corporate capacity.</p> <p>992. Actions by and against corporations.</p> <p>993. Petition against corporators as partners.</p> <p>994. Action by stockholder on behalf of corporation.</p> <p>995. Action by stockholder against officers.</p> <p>996. Petition by stockholder against directors and officers for official misconduct.</p> <p>997. Petition by corporation against its officers for negligence.</p> <p>998. Action by stockholder against corporation.</p> <p>999. Suit by assignee of stock against corporation.</p> <p>1000. Petition against stockholder for failure to transfer stock to assignee — Damages.</p> <p>1001. Petition by stockholder for recovery of dividends.</p> | <p>Sec. 1002. Actions by members of societies.</p> <p>1003. Petition by member of unincorporated association — Formal parts.</p> <p>1004. Petition against unincorporated association.</p> <p>1005. Corporate capacity — Defenses as to.</p> <p>1006. Corporations — Defenses generally.</p> <p>1007. Answer setting up failure of foreign corporation to comply with statute.</p> <p>1008. Answer that plaintiff is not a corporation.</p> <p>1009. Answer of acts <i>ultra vires</i>.</p> <p>1010. Dissolution of corporations.</p> <p>1011. Petition for dissolution of corporation.</p> <p>1012. Change of name of corporation.</p> <p>1013. Petition for change of name of corporation.</p> <p>1014. Notice of application for change of name.</p> <p>1015. Entry ordering change of name.</p> |
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Sec. 990. Averment of corporate capacity.— It was unnecessary at common law that a corporation in actions by it allege its corporate character or its title, even in case of a foreign corporation,¹ it being sufficient to state the name in the caption. There is a lack of uniformity in the adjudications of the American courts upon this question, although there does

¹ *Maxwell on Code Pldg.*, pp. 161, Corp. 632; *Insurance Co. v. Rogers*, 168; *Bank of Michigan v. Williams*, 5 Wend. 432; *Angell & Ames on* 30 Barb. 491; *Bliss Pl.*, sec. 247n. 109.

not seem to be any cogent reasons why such should be the case. There are some courts which hold that an averment of corporate existence is not essential to the maintenance of an action by or against a corporation. The question must be determined upon the fundamental principles involved in stating a cause of action, and will depend on the determination of the question whether or not it is a fact which should be pleaded. If it be so decided, then, in view of the opinion taken by some courts, that a statement of corporate capacity in the caption of a petition is sufficient, it must further be considered whether a statement of a fact essential to a cause of action can be made only in the caption of a petition. It needs no extended argument to prove that a plaintiff must show that he is entitled to maintain the action. An artificial person, such as a corporation, does not stand upon the same footing as does an individual. An individual defendant cannot deny his existence or make any defense concerning his name and capacity to sue by reason of his name alone except misnomer, while a number of valid defenses may be urged as to corporate capacity. It seems apparent, therefore, that corporate capacity is a fact which must be stated in the body of the petition. This rule may be technical, but is founded upon sound principles of pleading. Those courts adopting the common-law rule proceed upon the theory that the name of a corporation stated in the caption imports that it has corporate capacity, rendering it unnecessary to specifically aver the same in the petition.¹ There were valid reasons for dispensing with an averment of corporate capacity when corporations were organized under special acts of the legislature, as the court would take judicial notice of the act creating them;² but when organized under general laws, requiring certain steps to be taken to perfect an organization which are not open to the public, then it is obvious that when the legality of the proceeding is assailed,

¹ *Adams Express Co. v. Harris*, 120 Ind. 73, citing *Adams Express Co. v. Hill*, 43 Ind. 157; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Sayers v. Bank*, 89 Ind. 280; *O'Donald v. Railroad Co.*, 14 Ind. 259; *Ryan v. Bank*, 5 Kan. 658. See *Maxwell on Code Pldg.* 161. It has been held in *Smith v. Sewing Machine Co.*, 26 O. S. 562, that the code does not require the title of the plaintiff to be more specifically set out than was required at common law; but the question here was with reference to a foreign corporation.

² *Bliss on Code Pldg.* sec. 346.

the question of corporate existence becomes a fact to be proved. To obviate the necessity of proof, some codes have provided that it shall not be required.¹ The rule generally adopted, and which is founded upon principle, is, that a petition which does not aver corporate capacity is fatally defective and does not state a cause of action.² It is not necessary to state every fact essential to the existence of the corporation, but it may be made in a general way.³ An allegation that at a certain date, and ever since said date until the institution of this suit, a defendant has been a corporation, organized and existing as such under and by virtue of the provisions of law, is sufficient to show corporate capacity at the time of the suit.⁴

It has always been a rule of comity between states that a foreign corporation, excepting perhaps insurance companies, could hold property and sue and be sued in the courts of a sister state.⁵ To enable a foreign corporation to claim any rights under its powers or franchises in a sister state, it has been considered necessary, in an action by it, that it should disclose and plead the name of the state by which, or the terms in which, its powers or franchises were granted.⁶ But it is probably unnecessary to state the terms of its charter or articles of incorporation,—a simple allegation that it was organized under the laws of a certain state being sufficient.⁷

The statutes of most states require foreign insurance com-

¹ New York Code, sec. 1776; Concordia Saving, etc. Ass'n v. Read, 98 N. Y. 474.

² Miller v. Pine Mining Co., 81 Pac. Rep. 808 (Idaho, 1892); Loup v. Railroad Co., 63 Cal. 99; People v. Railroad Co., 88 Cal. 898; 28 Pac. Rep. 308; Greathouse v. Heed, 1 Idaho, 482; Bliss on Code Pldg., secs. 246, 247. And it is not cured by verdict. Richards v. Insurance Co., 22 Pac. Rep. 989 (Cal.); Morgan v. Menize, 60 Cal. 341. Where no averment of corporate capacity is made, and the petition contains no averment of the corporate existence, to which no objection is made by answer or otherwise until after judg-

ment, the defect is waived. Spence v. Insurance Co., 40 O. S. 517. In the absence of a plea of *nul tiel* corporation, it is not necessary for the plaintiff to make proof of its existence. Calumet Paper Co. v. Knight, etc. Co., 48 Ill. App. 566.

³ Washer v. Allensville, etc. Co., 81 Ind. 78; State v. Stout, 61 Ind. 143. See sec. 991, *post*, for form.

⁴ Bank v. Neff, 50 Kan. 506. 31 Pac. Rep. 1054.

⁵ Hanna v. Petroleum Co., 28 O. S. 622; Lewis v. Bank, 12 O. S. 182.

⁶ De Voss v. Gray, 23 O. S. 159.

⁷ Smith v. Sewing Machine Co., 26 O. S. 562. See Bliss on Code Pldg., sec. 247.

panies to obtain from the proper state officials a certificate authorizing them to do business. And in actions, therefore, by such companies, it should be shown by the pleadings that they are a corporation organized under the laws of a foreign state, and that they have complied with the laws of the sister state and are authorized to engage in business therein. Laws requiring foreign corporations, other than insurance and banking companies, to file a copy of their articles of association with the secretary of state or other officer before they can engage in business or maintain an action, have also been enacted in various states, so that all foreign corporations stand upon the same footing.¹ Courts have been called upon to consider these provisions, and are not in accord upon their effect. Some have gone to the extent of holding that a regulation making the filing of such a certificate a condition precedent to the right of a foreign corporation to maintain an action is in violation of the constitution of the United States.² So it has been held under similar provisions that the question of the right of a foreign corporation to do business by reason of not having complied with the statute as to filing the articles of incorporation cannot be called in question collaterally in an action by or against it, but that it can be determined only in an action in *quo warranto* brought for that express purpose.³ Again, it is held that a failure to comply with such provision, however it may affect the right to hold and enjoy property, cannot affect its capacity to sue.⁴ Nor is a contract entered into by a foreign corporation invalidated because it has not complied with the law as to "registration," as such failure merely prevents its enforcement until the statute has been complied with.⁵

While it is not the province of this work to discuss constitutional questions, yet it would seem that the provisions of the various codes requiring foreign corporations to register are consonant with principles of pleading. Citizens of a state

¹ R. S. sec. 148c; 91 O. L. 272-4; (S. D., 1893); *Mill v. Bartlett*, 54 90 O. L. 261; amended, 91 O. L. 355. N. W. Rep. 544 (N. D.); *Grant v. Coal Co.*, 80 Pa. St. 208. See *Murfrees v. Foreign Corp.*, sec. 79.

² *Kindall v. Lithographing Co.*, 85 Pac. Rep. 534 (Colo., 1893); U. S. Constitution, Art. 1, sec. 8; *Manuf. Co. v. Ferguson*, 113 U. S. 727.

³ *Wright v. Lee*, 55 N. W. Rep. 931

⁴ *Utley v. Mining Co.*, 4 Colo. 369.

⁵ *Singer Manuf. Co. v. Brown*, 64 Ind. 548; *Daly v. Insurance Co.*, 64 Ind. 1.

have the right to know that they are dealing with properly organized corporations, authorized to sue and be sued by their corporate name, and that they have complied with the provisions of the laws of their own state; and in the absence of any restriction against a foreign corporation preventing them from engaging in any line of business, or interfering with interstate commerce, it would seem that the registration laws, so called, are proper and not in conflict with any constitutional provision, but are enacted only for the purpose of providing safeguards to the rights and remedies of individuals.¹ The code of New York has gone to the extent of requiring a corporation to allege whether it is a foreign or domestic one.² Yet the courts of that state are not in harmony upon this provision. It is held in some cases that a complaint which fails to allege whether a defendant is a foreign or domestic corporation is not subject to a demurrer in not stating facts sufficient to constitute a cause of action;³ while in later cases the contrary view is taken.⁴

In conclusion, it may be stated that corporate capacity is a fact to be averred. Consequently, foreign corporations must not only allege corporate capacity derived from the charter of their native state, but must also allege compliance with the license or registration law. The remedy for failure so to do has been pointed out elsewhere — by demurrer if apparent on the face of the petition,⁵ otherwise by answer.⁶

Sec. 991. Form of averment of corporate character.—

If plaintiff: Plaintiff is a corporation, duly organized and incorporated under the laws of the state of Ohio [and is engaged in the business of —, at C., — county, in said state].

If defendant: The defendant is a corporation duly organized and incorporated under the laws of the state of Ohio [for the purpose of carrying on the business of — at C., in the county of —, in said state].

NOTE.— *Ante*, sec. 990.

¹ See Murfree on Foreign Corporations, secs. 92-9.

² Civil Code, sec. 1775.

³ Rothchild v. Railway Co., 10 N. Y. S. 36 (1890).

⁴ Chandler v. E. T. Co., 18 N. Y. S. 573; National Temp. Soc. v. Anderson, 2 N. Y. S. 49; Gilpin v. Railroad Co., 17 N. Y. S. 520. It may be inferred

from the facts alleged as to which class it belongs. American Baptist, etc. Soc. v. Foote, 52 Hun, 308. The place where organized is immaterial. Swift, etc. Co. v. Crawford, 34 Neb. 450; 51 N. W. Rep. 1084 (1892).

⁵ *Ante*, sec. 95, p. 99.

⁶ See form, sec. 1007, *post*.

Sec. 992. Actions by and against corporations.—All actions in behalf of a corporation must necessarily be brought in the name of the company, and so long as the officers are ready and willing to bring an action, stockholders, even though interested in the affairs of the corporation, cannot commence a proceeding.¹ In Ohio, under a former statute, corporate names only could be used to prosecute a suit; and after the dissolution of a corporation, or after it had been placed in the hands of a receiver, it could no longer sustain an action by its corporate name, but all actions in its behalf while so in the hands of a receiver should be in the name of such receiver.² An action may be sustained by a corporation to cancel certificates of stock which have been wrongfully issued by its officers, which may be in the hands of a third person as collateral, and all holders of any of such certificates may be joined as defendants for the purpose of determining the validity of the same.³ A contract regularly made by a corporation may be ratified by it and an action brought thereon,—an averment that it was made by the plaintiff through its proper officers amounting to a ratification.⁴ And in an action by a corporation upon a contract, it is not necessary to aver that it had power to make the same.⁵ An action may be sustained by an association of persons who have in good faith attempted to organize a corporation and have commenced and carried on business as a corporate body.⁶ A corporation cannot enforce a usurious contract in Ohio, although the contract be made in another state where it is valid.⁷ Nor can an executory contract between a corporation and a stockholder for the purchase of stock be enforced either by an action for specific performance or for damages.⁸ A pledgee of stock of a corporation may, upon refusal of the corporation to transfer the same to his own name, sustain an action against the company for damages as for a wrongful conversion.⁹

¹ See *post*, sec. 994.

⁴ *Insurance Co. v. Dheim*, 48 Wis. 428.

² *Miami Exporting Co. v. Gano*, 13 O. 269. Trustees of a bank authorized to close up its affairs may sustain an action in their collective names after its charter has expired. *Martin v. Trustees*, 13 O. 250.

⁵ *St. Paul Land Co. v. Dayton*, 37 Minn. 364.

⁶ *Hagerman v. Building Ass'n*, 25 O. S. 186.

⁷ *Ewing v. Bank*, 43 O. S. 81.

³ *Railway Co. v. Bank*, 23 W. L. B. 248.

⁸ *Koppin v. Greenleaf*, 38 O. S. 275.

⁹ *Railway Co. v. Rawson*, 16 W. L.

It has been held that an action may be sustained against a corporation while in the hands of a receiver without making the receiver a party, and a judgment rendered therein may, if kept alive after the discharge of the receiver and the return of the property to the company, be enforced against the corporation.¹ When a corporation is placed in the hands of a receiver, its property is then in the custody of the law, and any interference or attempted interference therewith, either by acts of individuals, or by any proceedings at law by attachment, execution or otherwise, is clearly in violation of the orders or judgment of the court appointing the receiver. The subject-matter of such an independent suit against the corporation, while in the hands of a receiver, is in entire control of the receiver as an officer of the court, and is governed and controlled entirely by the orders of the court. It is impossible for any person to sustain an action which will in any way affect the property or rights of such corporation without first having obtained the consent thereto of the court appointing the receiver.² Such being the case, a judgment rendered against a corporation while in the hands of a receiver cannot in the slightest degree affect the corporate property until returned to the corporation.

Sec. 993. Petition against incorporators as partners.—

Plaintiff says that on the — day of —, 18—, the defendants organized and associated themselves together for the transaction of business under the name of — Company, assuming to be, and holding themselves out to the public generally as, a corporation duly organized under the laws of Ohio, when in truth and in fact they were not, but were without any color of a corporate franchise, but are partners. There is due plaintiff from said defendants, as partners aforesaid, the sum of \$— upon an account [*or, note*] of which the following is a copy with all the credits and indorsements thereon, to wit: [*Copy.*]

Plaintiff therefore asks judgment, etc.

NOTE.— Such persons are liable as partners. *Abbott v. Smelting Co.*, 4 Neb. 416.

B. 428. An action cannot be prosecuted against a defunct corporation 284.
but may be against the trustees ¹See ch. 75, *Receivers*, sec. 1068, thereof. *Renick v. Bank*, 18 O. 289. 1068.

¹ *Mather v. Railway Co.*, 8 O. C. C.

Sec. 994. Action by stockholder on behalf of corporation.

It is a general rule that an action for an injury caused by the misconduct of an officer must be brought in the name of the corporation, and that a stockholder cannot sustain such an action or actions against third persons on behalf of the corporation. Nor can stockholders maintain actions in their individual names,¹ even where one has become the owner of all of the stock.² But, like many general rules, there are exceptions. It is an elementary principle that where there is a wrong there must be a remedy, if it be in the power of courts to furnish one. Hence it follows that when rights of a stockholder are placed in jeopardy by acts of the corporation through its officers, for which there is no remedy at law, equity will step in and protect the same.³ Stockholders have such an interest in the corporate property as entitles them, when their interests are not protected by those whose duty it is, to prevent it from being lost or their rights therein from becoming impaired.⁴

The course which complaining stockholders must first take is to make a demand upon the officers in charge of the affairs of the corporation to commence an action. And generally it is only when they have refused to bring an action that stockholders themselves may bring a suit in behalf of the corporation.⁵ Demand should be made upon the managing officers.⁶ The refusal of the president alone will not be sufficient; it should be by a majority of the directors, and wilful.⁷ While it must generally be shown that a request has been made upon the officers and that they have refused, yet it may be unnecessary in some cases; as, for instance, where the directors are under the influence of a president and hold their stock by virtue of a voluntary transfer from him to enable them to act;⁸ or where it would be entirely useless to make a demand.⁹ In every case where a stockholder is allowed to

¹ Tomlinson v. Union, 87 Ind. 308;

Greaves v. Gouge, 69 N. Y. 154; La

Grange v. Treasurer, 24 Mich. 468;

Talbot v. Scripps, 31 Mich. 268.

² Button v. Hoffman, 61 Wis. 20;

50 Atl. Rep. 181.

³ Spelling on Ex. Rem., sec. 783,

citing Bell v. Tel. Co., 16 Fed. Rep.

14; Huersey v. Veazie, 24 Ma. 11.

⁴ Baldwin v. Canfield, 26 Minn. 43.

⁵ Whitney v. Fairbanks, 54 Fed.

Rep. 985.

⁶ Railroad Co. v. Woods, 88 Ala.

630.

⁷ Wallace v. Bank, 89 Tenn. 630.

⁸ Dunphy v. Newspaper Ass'n, 146

Mass. 495; 16 N. E. Rep. 426.

⁹ Brewer v. Boston Theatre, 104

bring an action for injury done to the corporate body, he must state in his pleadings that the corporation, or those who represent it, are unwilling or have declined to bring the action.¹

Stockholders may follow corporate property which has been fraudulently disposed of by directors into the hands of a purchaser with notice and recover its value, or they may annul a fraudulent transfer.² An action cannot be brought by a stockholder for the recovery of his share of corporate funds which have been misappropriated against a corporation which has not been engaged in business for some years. The right still exists in the corporation, and the recovery should be for the corporation.³ Nor can he obtain an injunction to restrain a slander of title to property belonging to the corporation.⁴ And when seeking relief against an *ultra vires* act, he must proceed promptly before the act of which he complains has become the foundation of rights or equities which must be overthrown before relief can be granted.⁵

The rules stated in this section are not applicable to suits by unincorporated companies, which must be brought by their members. And where they are so numerous that it is impracticable to bring them before the court, one or more may sue for the benefit of all.⁶ This will include an unincorporated joint-stock company formed in another state, and will permit the president of such company, who is a stockholder, to sue in behalf of himself and all other stockholders.⁷

Sec. 995. Action by stockholder against officers.—The officers of a corporation are held to a strict accountability to the creditors and the stockholders. If they have failed in their duty to the detriment of the corporation, stockholders are permitted to sustain actions against them. The right of action exists in favor of a person injured by misconduct of officers, where there has been a judgment of forfeiture by

Mass. 378; *Courier v. Railroad Co.*, 85 How. 355; *Tazewell v. Loan Trust Co.*, 12 Fed. Rep. 752; *Thompson v. Stanley*, 20 N. Y. S. 817.

¹ *Reeder v. Wade*, 2 C. S. C. R. 12.

² *Shaw v. Edison Installation Co.*, 19 W. L. B. 292; *Goodin v. Canal Co.*, 18 O. S. 169.

³ *Thompson v. Stanley*, 20 N. Y. S. 817.

⁴ *Langdon v. Iron Co.*, 41 Fed. Rep. 609.

⁵ *Rabe v. Dunlap*, 25 Atl. Rep. 959 (N. J. Ch., 1893).

⁶ O. Code, sec. 5008.

⁷ *Platt v. Colvin*, 31 W. L. B. 175; 51 O. S. —.

reason thereof.¹ They are not liable for error in judgment if acting in good faith.² The same rule prevails in such actions as stated in a preceding section as to suits brought by stockholders on behalf of the corporation against third persons. A stockholder is not allowed to sue the officers unless the company has refused upon an express request.³ As a general rule it should appear that an effort has been made to set the corporation in motion to redress the wrong, or that demand has been made upon the directors, or that it would be useless so to do,⁴ and the refusal of the corporation to bring the suit should here also be alleged.⁵ But to this rule there are some very important exceptions. It is not necessary to allege that a formal application or demand upon the directors or officers of a corporation has been made, where there are sufficient facts disclosed in the pleading to show that such request or demand would have been unavailing; and the general tendency is to allow slight circumstances to obviate the necessity of making this allegation. So, where the directors themselves are the parties charged with the wrong, or it is by their fraud and collusion that the same has been committed, and the suit is to be brought against them, from the very nature of the case they are incapacitated from representing the company.⁶ It is sufficient to entitle the stockholder to sue to show that the corporation is under the control of the directors whose official conduct is attacked.⁷ An allegation that the majority of the directors participated and assisted in the unlawful action of the board of directors, and that those constituting such majority of the board have ever since controlled its action, is sufficient to dispense with the necessity of averring demand.⁸ Courts will always interfere where the

¹ O. Code, sec. 6790.

Wis. 108; *Palmer v. Hanks*, 78 Wis.

² *Bond v. Poe*, 1 Toledo Leg. News, 46.

40.

³ *Whitney v. Fairbanks*, 54 Fed. Rep. 985 (1898).

⁴ *Brewer v. Theatre*, 104 Mass. 378; *Ryan v. Railway Co.*, 21 Kan. 365.

⁵ *Greaves v. Gouge*, 69 N. Y. 154. See *ante*, sec. 994.

⁶ *Brewer v. Boston Theatre*, 104 Mass. 378; *Eichweiler v. Stowell*, 78 Wis. 316; *Doud v. Railroad Co.*, 65

⁷ *Hannerty v. Standard Theatre*, 109 Mo. 297; *Smith v. Poor*, 40 Me. 415; *Ashton v. Dashaway Ass'n*, 84 Cal. 61; *Wayne Pike Co. v. Hammons*, 27 N. E. Rep. 487 (Ind., 1891); *Hodges v. Screw Co.*, 1 R. I. 340; *Cook on Stock and Stockholders*, sec. 741, and cases cited; *Morawetz on Priv. Corp.*, sec. 238, 242, 252.

⁸ *Smith v. Dorn*, 96 Cal. 78; *Par-*

officers have exceeded their discretion or have been guilty of misconduct equivalent to fraud.¹ Stockholders may sustain an action against the directors for an accounting and for fraudulent practices,² and may set aside a sale of corporate property fraudulently made by the directors.³ The court will grant relief to a stockholder to prevent an unlawful act and sometimes to declare a consummated one void.⁴ There must in such cases, however, be a clear illegal act such as will result in an irreparable injury to the stockholder. Persons assuming to act as directors before the requisite amount of capital has been subscribed cannot create any liability, and are therefore personally liable to persons with whom they have dealt.⁵ Some courts hold that a stockholder may sue the corporation and the directors without joining other stockholders.⁶ But where the duty is owing to all of the stockholders or to a particular class, one cannot sustain an action against the directors, but all should be brought before the court.⁷

Sec. 996. Petition by stockholder against directors and officers for official misconduct.—

The defendant is now, and at all times hereinafter mentioned has been, a corporation duly organized and existing under the laws of the state of Ohio, and engaged in the business of [*state business*], in the city of —, in said state.

That said corporation has a capital stock of — shares of the par value of \$— per share, and that no personal claim is made against said defendant corporation herein.

That the plaintiff is the owner and holder of — shares of the capital stock of the said corporation, such shares being represented by stock certificates, issued by said defendant corporation to this plaintiff, of the following description, to wit: One certificate numbered — for — shares, and bearing date —, 18—, and one certificate numbered, etc.

rott v. Byers, 40 Cal. 620; *Moyle v. Landers*, 88 Cal. 580; *Ashton v. Dashaway Ass'n*, 84 Cal. 70.

¹ *Cicotte v. Anciaux*, 58 Mich. 227.

² *Taylor v. Exporting Co.*, 5 O. 162; *Beach v. Cooper*, 72 Cal. 99; *Greaves v. Gouge*, 69 N. Y. 154; *Brewer v. Boston Theatre*, 104 Mass. 373.

³ *Smith v. Dorn*, 96 Cal. 73, in which it was held that where a resolution authorizing a sale recited that it was for the purpose of paying debts, the

petition should negative such recitals and aver the ability of the corporation to pay the debts.

⁴ *Chicago v. Cameron*, 120 Ill. 447; *Railroad Co. v. Duckworth*, 2 O. C. C. 518; *Spelling on Ex. Rem.*, sec. 784.

⁵ *Trust Co. v. Floyd*, 47 O. S. 526.

⁶ *Wickersham v. Crittenden*, 93 Cal. 17; 28 Pac. Rep. 788.

⁷ *Railroad Co. v. Railroad Co.*, 18 O. S. 544.

That the defendants, J. M. S., G. W. R., C. A. R., W. R. and O. E. S., own and hold a majority of the shares of the capital stock of said corporation, to wit: [*State number.*]

Plaintiff alleges that the defendant J. M. S., since the — day of —, 18—, has held continuously, and still holds, the office of president of said corporation, and has since the — day of —, 18—, held, and still holds, the position of director of said corporation; that the defendant G. W. R., since the — day of —, 18—, has held, and now holds, the office of vice-president, director and general manager of said corporation; that the defendant C. A. R. has continuously since the — day of —, 18—, held, and still holds, the office of treasurer and director of said corporation; that the defendant W. R., since the — day of —, 18—, has held, and still holds, the office of secretary and director of said corporation, and that the defendant O. E. S. has held, since the — day of —, 18—, and now holds, the office of director of said corporation; that the said persons, defendants just above mentioned, form and constitute the board of directors of said corporation.

That at a certain meeting held on the — day of —, 18—, by the aforesaid board of directors of said corporation, and long after the said defendants had accepted and entered upon the offices they then respectively held as aforesaid, the said defendants, J. M. S., C. A. R., W. R. and O. E. S., as such directors of said corporation, being then and there present, with the fraudulent intent, purpose and design to defraud and cheat this plaintiff and others of the minority of said stockholders of said corporation, and to divert a large portion of the profits and proceeds of said corporation from the legitimate purpose and object of said corporation, and to their own and unlawful ends and private use and benefit, and without intending to give any fair, adequate or reasonable return or consideration to said corporation therefor, did, as such directors of said corporation, agree and conspire to divert large portions of the profits and proceeds of said corporation by adopting a certain resolution of said board of directors as follows:

“Resolved, that the salaries of the officers of this company be and they are hereby fixed as follows:

“Each director shall receive a salary of \$—— a year.

“The general manager, as manager, shall receive a salary of \$—— a year.

“The president, as president, shall receive a salary of \$—— a year.

“The secretary, as secretary, shall receive a salary of \$——,”
etc.

That by reason of such unlawful acts aforesaid, the said defendants herein, as such managing officers of said corporation, fail and refuse to pay and distribute the profits and proceeds of the company in the proper proportions to the stockholders

thereof, in the form and manner as they lawfully and properly should do, as dividends.

That by reason of their unjust, fraudulent and illegal refusal to divide said profits and proceeds of said corporation among all the stockholders in the form of dividends, and from the gross mismanagement of the said defendants of the affairs of said corporation, the value of the stock therein held by this plaintiff and other stockholders does not receive such a fair, reasonable and proper price in the market as it properly and fairly should, to the great injury and damage of this plaintiff and other stockholders.

Wherefore plaintiff prays that an accounting may be had to ascertain the amount of the profits, proceeds or property of the said corporation illegally and fraudulently appropriated by said above-named defendants to their own use and benefit, and that judgment may be entered against them jointly and severally for said amounts so ascertained, such amounts to be paid to the defendant corporation for the use and benefit of all the stockholders thereof. That a receiver may be appointed to take charge, management and control of the affairs and the business of the corporation, and that he properly, under direction of the court, distribute the profits of the said corporation among all its stockholders, and for such other relief as may seem proper and equitable.

NOTE.—*Compensation of directors.*—Directors are not entitled to compensation for their services as directors unless it is so provided in the charter. *Citizens' Nat. Bank v. Elliott*, 55 Ia. 104; *Railway Co. v. Cheeney*, 87 Ill. 446; *Bank v. Drake*, 29 Kan. 311. It would be contrary to established principles to allow the directors or other officers to fix their own compensation for services rendered the company. *Morawetz on Private Corporations*, sec. 508, and numerous cases cited. Trustees of associations cannot vote themselves "back pay." *State ex rel. v. People's, etc. Ass'n*, 42 O. S. 579. See *Cook v. Sherman*, 20 Fed. Rep. 187, and note, as to relationship of directors to corporation.

In *Kelsey v. Sargent*, 40 Hun, 150, the action of a board of directors consisting of officers benefited thereby, in voting themselves salary, was held invalid.

Demand upon directors for redress before suit brought.—It is a general rule that an effort must be made to set the corporation in motion to seek redress. But there are exceptions. See *ante*, sec. 995.

Sec. 997. Petition by corporation against its officers for negligence.—

Plaintiff avers that it is a corporation duly organized and existing under the laws of the state of Ohio, for the sole purpose of [*state object*].

That on the — day of —, 18—, the defendant C. D. was duly elected president of said corporation at the annual meeting of the stockholders of said corporation. [*Allegation of election of vice-president and treasurer, as above.*]

That during the time the said A. B., C. D. and E. F. held their respective offices aforesaid, they were members of the board of directors of said corporation and assumed to and did

transact all the business of the said corporation without the authority, approval or consent of said board of directors.

That as such president, vice-president and treasurer, and members of said board of directors, it became and was during all the time defendants held such offices, respectively, their duty, in the discharge of their duties in such offices, to use ordinary care, prudence and diligence.

That during the time said defendants held their respective offices it became and was their duty to [*state specific duty required, and then state how it was neglected*].

That by reason of the gross neglect, mismanagement and inattention of said defendants to their duties of their said offices respectively [*state briefly duties neglected*], the said corporation, plaintiff herein, has lost the sum of \$——.

That plaintiff, before the commencement of its action herein, demanded of the defendants and each of them that they pay and restore to it the said sum of \$——, so as aforesaid lost through their gross neglect, mismanagement and inattention to their respective duties, but said defendants and each of them have wholly failed and refused to restore or repay to said corporation said sum or any part thereof, to make said corporation good for the said loss so sustained by it.

Wherefore plaintiff demands judgment against said defendants for the sum of \$——.

NOTE.— If directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, they will be required to personally make good the loss. *North Hudson R. & L. Ass'n v. Childs*, 83 Wis. 460; *Thompson on Liability of Officers of Corp.*, 375.

Sec. 998. Action by stockholder against corporation.—

An action may be sustained by a stockholder against a corporation to subject assets in the hands of a trustee of the company to the payment of a debt, in which case the corporation or those who represent it should be made parties;¹ or they may bring an action for the recovery of money advanced upon shares of stock which have been wrongfully transferred.² But they cannot sustain an action for damages in the depreciation of stock unless there is a special injury to the stock of an individual holder.³

Sec. 999. Suit by assignee of stock against corporation.

Where stock has been assigned which the corporation refuses to transfer to the assignee, the latter may, as stated in a preceding section,⁴ prosecute an action against the former for

¹ *Reeder v. Wade*, 2 C. S. C. R. 19.

² *Oliphant v. Mining Co.*, 63 Ia. 332.

³ *Railroad Co. v. Robbins*, 35 O. S.

⁴ *Ante*, sec. 799.

damages for its failure so to do, or may bring a suit in equity, either of which he may pursue at his election.¹ An assignee of stock upon which there is an instalment due may by a suit in equity compel the corporation to issue a certificate to him.²

Sec. 1000. Petition against corporation for failure to transfer stock — Damages.—

Plaintiff alleges that on the — day of —, 18—, he purchased for a valuable consideration ten shares of stock in the [name corporation] from one C. D., who was then and there the owner thereof and a stockholder in said company. That the said C. D. thereupon indorsed upon said certificates of stock so purchased by plaintiff his written assignment thereof to plaintiff, a copy of which stock and said assignment is as follows: [*Copy.*]

That on the — day of —, 18—, plaintiff presented said certificates of stock to G. H., the secretary of said defendant company, who was authorized to make transfers of all stocks of said company which had been sold and assigned, and it thereby became the duty of said G. H., as such secretary, to make a transfer upon the stock books of said company of the stock so by this plaintiff purchased from the said C. D., but that said G. H., as such secretary, refused and still refuses to transfer said stocks upon the said stock books of said company to plaintiff, and that the said company by its board of directors refuse to transfer the same, and the same has never been transferred.

That by reason of the failure of said defendant company and its said officers to transfer said stock to said plaintiff, the same are utterly worthless and valueless to him, and he cannot derive any profit therefrom. That the said C. D. is wholly insolvent and the amount cannot be recovered from him, and the plaintiff has thereby wholly lost the sum of \$— so by him paid to the said C. D. for said stock, and by reason of the wrongful conduct of said defendant company plaintiff has been damaged in the sum of \$—.

[*Prayer for damages.*]

NOTE.—The suit may be in equity for specific performance. See *Tempest v. Kilmer*, 52 E. C. L. 298; *ante*, *secs.* 799, 999.

Sec. 1001. Petition by stockholder for recovery of dividends.—

The plaintiff says that the defendant is, and at the date hereinafter set forth was, a corporation, duly incorporated

¹ *State ex rel. v. Carpenter*, 51 O. S. 421; *Hill v. Rockingham*, 41 N. H. —; *Freon v. Carriage Co.*, 42 O. S. 567; *Cushman v. Thayer N. Co.*, 76 N. Y. 365; *Railroad Co. v. Pettis*, 26 O. S. 259.

² *Iron R. R. Co. v. Fink*, 41 O. S.

under the laws of the state of Ohio, organized for profit, and having a capital stock owned by stockholders.

Plaintiff is, and at said date hereinafter specified was, the owner and holder of — shares of said capital stock, of a par value of \$—— each, fully paid up. On or about —, 18—, said defendant duly declared a dividend of — per cent. on said par value of said stock, whereby plaintiff became entitled to receive from said corporation on his said shares of stock the sum of \$——, but although he has demanded that sum of defendant, defendant refuses and fails to pay the same.

Wherefore plaintiff asks judgment against defendant in the sum of \$——, with interest from — —, 18—.

Sec. 1002. Actions by members of societies.—Suits on behalf of unincorporated companies may be brought by the individual members, and where they are so numerous that it is impracticable to bring them all before the court, one may sue in behalf of himself and others.¹ Disputes between members of voluntary societies must first be settled by the tribunal established by themselves, and according to their own rules and regulations. But when a member has been expelled from a benevolent society he may bring either an action for damages, or in *mandamus* to compel his restoration as a member, but waives his right to *mandamus* by the action in damages.²

Following the principle that a court will not determine speculative or abstract questions of law, or lay down rules for the future conduct of persons in their social relations, equity will not interfere to prevent a society from taking steps towards the punishment of a member, unless it be shown that it will inflict upon him an irreparable injury, and that there is no other means of redress, although in any event it will not prevent an expulsion.³ To hold the trustees of an unincorporated society personally liable for contracts of its agents, it must be shown that they have participated in the

¹ O. Code, sec. 5008; *Platt v. Colvin*, 81 W. L. B. 175; 51 O. S. —.

² *State ex rel. v. Lipa*, 28 O. S. 665.

³ *Thomas v. M. M. P. Union*, 121 N. Y. 45; *Hershier v. Williams*, 24 W. L. B. 814, holding that equity will not restrain a lodge from proceeding to expel a member for an alleged irregularity by the lodge or officers. See *State v. Odd Fellows' G.*

Lodge, 8 Mo. App. 1101. Where a society is about to expel a member for misconduct, civil courts will not entertain jurisdiction to prevent the same, nor will they reinstate the member. *Gregg v. Medical Society*, 111 Mass. 185; *Grosvenor v. U. S. Society*, 118 Mass. 78; *Niblack on Mut. Ben. Soc.*, sec. 138.

appointment of or in some way ratified the contract of such agents.¹

Sec. 1003. Petition by member of unincorporated association.—

[*Formal parts.*]

Plaintiff says that the — Company is a voluntary association, organized on the — day of —, 18—, under the laws of —, and ever since existing and doing business as such, and is composed of about — members, all of whom have a joint ownership and interest in the cause of action hereinafter set forth, but are too numerous to be joined as parties plaintiff. Plaintiff is a member of said association, and as such brings this suit in his behalf as well as in behalf of all the members thereof.

Sec. 1004. Petition against unincorporated association.

[*Caption.*]

That the said defendants are members and officers of an unincorporated association of persons known as the — Company, having a locality and being and doing business in — county, state of Ohio.

That the said C. D. is the president, the said E. F. the secretary, the said G. H., I. J. and K. L. directors and managers, and the said M. N., O. P., Q. R. and S. T. members of said unincorporated association.

That the plaintiff is unable to give the name of the treasurer of said association, nor the names of all, nor how many there are, of its directors and managers, nor the names of all, nor how many there are, of the members of said association.

That before the bringing of this action he made diligent inquiry of all persons supposed to know the names of all said officers and members, and requested the said C. D. and E. F. and several of the directors [and members] of said association, who are above named, to furnish him a list of the officers and members thereof, with which request they have failed and refused to comply.

That said defendant and others, whom to the plaintiff are unknown as aforesaid stated, are associated together under the name of said — Company, for the purpose of maintaining a social club or society to furnish amusement, entertainment, reading, and to keep and maintain a place of resort and club-rooms for the members thereof.

[That said company has a constitution and by-laws, but the same are in the possession of the officers and members thereof, and the plaintiff is unable to furnish a copy thereof.]

There is due plaintiff from the defendants upon an account the sum of \$—, of which the following is a copy, to wit:

[*Copy.*]

¹ De Voss v. Gray, 22 O. S. 159.

Plaintiff therefore asks that the defendants herein named, or any one of them who has knowledge thereof, be required to answer the interrogatories hereto annexed and herewith filed, so that plaintiff may ascertain who are the officers and members of said association; and that when he so ascertains their names he may be permitted to so amend this his petition as to make them parties to this action; and that he may then have judgment against all of said defendants as then determined for — dollars, and for all other proper relief.

Sec. 1005. Corporate capacity — Defenses as to.— Stockholders are not protected by the corporate charter when the corporation has engaged in an unlawful business or has performed acts in excess of its corporate powers.¹ It is a general rule that corporate capacity cannot be inquired into collaterally;² but this cannot apply where the real purpose of a corporation was to use it as an instrumentality in the accomplishment of an illegal purpose, in which case stockholders cannot shield themselves behind the corporation.³ Where an answer of a defendant admits the execution of a contract, he is estopped from denying the corporate existence;⁴ but a denial of the corporate character without denying the corporate existence is good as against a general demurrer.⁵ Corporate capacity may be questioned by the defendant by a general denial when it is only sought to be shown that the company was never organized; but, as there are a number of grounds upon which the corporate existence may be questioned, the facts upon which a defendant relies should ordinarily be stated.⁶ A defendant who has already admitted the corporate existence cannot afterwards question it nor prove that the charter was obtained by fraud, especially if he is a subscriber.⁷ It is said that corporate existence cannot be raised on demurrer,⁸ but must be by answer.⁹ A person against

¹ Medill v. Collier, 16 O. S. 599; Brundred v. Rice, 49 O. S. 640.

² Bank v. Renick, 15 O. 322.

³ Brundred v. Rice, *supra*; Beach on Priv. Corp., secs. 163c, 162b, note 7; Vorendenburgh v. Behan, 33 La. Ann. 627; McGrew v. Produce Exchange, 35 Tenn. 572; Lawler v. Walker, 18 O. 151. Collateral inquiry may be made into unauthorized and fraudulent acts of a corporation. Bartholomew v. Bentley, 1 O. S. 37.

⁴ Wash. Mill Co. v. Cregg, 35 Pac. Rep. 412 (Wash., 1898).

⁵ Ridenour v. Mayo, 29 O. S. 188.

⁶ Folsom v. Freight Line, 54 Ia. 490-497; Rembert v. Railway Co., 31 S. C. 309; 9 S. E. Rep. 968 (1888).

⁷ Beinninger v. Gall, 1 C. S. C. R. 331.

⁸ Bank v. Corbett, 10 Abb. N. C. 85; Stanley v. Railroad Co., 89 N. C. 331. But see *ante*, sec. 95.

⁹ Stanley v. Railroad Co., *supra*.

whom a corporation asserts a right based upon a franchise may, as a defense, deny the existence of such franchise or power.¹

Sec. 1006. Corporations — Defenses generally.— It is sometimes said that a corporation is a legal entity apart from the natural persons who compose it. This, however, is a mere fiction and cannot be urged to an extent and purpose not within its reason and policy in such a way as to work an injury.² A plea of *nulla tiel* corporation may be made in a suit by a corporate body when it is claimed that there is no such corporation.³ After a corporation has organized and acted as such in making a contract, it cannot deny its corporate existence in an action against it upon such contract.⁴ Nor can it question the authority of its agent to execute a time check in an action for wages, unless it has pleaded *non est factum*;⁵ or avail itself of acts *ultra vires*, unless specially pleaded.⁶ A person having dealt with a corporation under a regular name cannot be permitted to set up a want of corporate authority.⁷ The validity of an election of officers cannot be inquired into collaterally in an action by a creditor of the corporation.⁸ The same rule prevails with reference to making a defense in behalf of a corporation as in actions by it, and it is therefore essential that the defense be made by the corporation itself. But if it refuses so to do, the stockholders may make the defense.⁹ While it may not be authoritatively settled that the stockholders must demand that the corporation make the defense, yet by analogy from those decisions holding that they must do so when they desire to prosecute an action in its behalf, they certainly should adopt the same course when desiring to make a defense to an action.¹⁰ It has been held, however, that whether or not a stockholder may

¹ Zanesville v. Gas Light Co., 47 O. S. 1.

² State ex rel. v. Standard Oil Co., 49 O. S. 187; Sportsman Shot Co. v. Shot & L. Co., 80 W. L. B. 87.

³ Osborn v. People, 108 Ill. 224; Raccoon Nav. Co. v. Eagel, 29 O. S. 288.

⁴ Calendar v. Railroad Co., 11 O. S. 516.

⁵ Railway Co. v. Wilson, 19 S. W. Rep. 910 (Tex., 1892).

⁶ Griess v. Benefit Ass'n, 15 N. Y. S. 71; 133 N. Y. 619.

⁷ Manufacturing Co. v. Schoolley, Tapp. 282.

⁸ Raymond v. Railway Co., 21 W. L. B. 108.

⁹ Park v. Oil Co., 26 W. Va. 486.

¹⁰ See ante, sec. 994.

make a defense for the corporation rests within the discretion of the court.¹ This discretion ought to be exercised in favor of stockholders whenever their interests are manifestly involved and it appears that acts of officers have been in disregard of such interest. They have this right especially in cases where corporate officers have been guilty of fraudulent acts. Indeed, the provision of the code is sufficiently broad to allow a stockholder in almost any case to appear and defend, upon the theory that he claims an interest in the controversy adverse to the plaintiff.² But there would be no good reason why a stockholder should be allowed to defend when the officers are ready and willing to do so.

Sec. 1007. Answer setting up failure of foreign corporation to comply with statute.—

That plaintiff is a foreign corporation, organized under the laws of the state of —, for the purpose of carrying on the business of [*state business*], and is now engaged in such business within the state of Ohio.

That the indebtedness sued on herein was for [*state what*], under a contract entered into by said plaintiff and defendant at —, in this state. [*Or, if insurance company:* That the note sued on herein was given in consideration of a policy of insurance issued by the plaintiff to defendant upon a contract of insurance entered into at —, in this state, with one R. F., claiming to be the duly authorized agent of the plaintiff for the county of —, in this state, and for no other consideration.]

That the plaintiff had not then nor has it since complied with the provisions of an act to regulate foreign corporations, passed by the general assembly April 25, 1893, 90 O. L. 261, by filing with the secretary of state a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the amount of its capital stock, the business which it is engaged in carrying on, or designated a person upon whom process against it may be served in this state.

NOTE.—See 90 O. L. 261. When this defect is not apparent the question must be raised by answer; if apparent, by demurrer. See *ante*, secs. 95 and 96.

¹ *Bronsin v. Railroad Co.*, 2 Wall. 381; *Park v. Petroleum Co.*, 25 W. 802; *Dodge v. Woolsey*, 18 How. Va. 108.

² R. S., sec. 5006.

Sec. 1008. Answer that plaintiff is not a corporation.—

[*Caption and formal parts.*]

That the said plaintiffs were not at the time of the commencement of this action and are not now a corporation, and have no right as such to commence or prosecute this action.

NOTE.— See *ante*, sec. 1006; *Sunapee v. Eastman*, 32 N. H. 473.

Sec. 1009. Answer of acts ultra vires.—

[*Caption and formal parts.*]

That said corporation was created for the following purposes and none others, to wit: [*State the powers of the corporation.*] That the defendant did not have any power under its articles of corporation to execute the instrument set forth in the petition, and that same was executed without authority, and is therefore void and of no effect whatever.

Sec. 1010. Dissolution of corporations.—A majority of the directors of a corporation upon discovering that its stock, property or effects have been so far reduced that it will not pay the indebtedness, or if they deem it advisable for the interest of the stockholders, or are authorized so to do, may apply to the court for a dissolution of the corporation.¹ A petition for a dissolution should contain an inventory of all the property, capital stock, names of stockholders and their residences, the number of shares held by each, with the amount due thereon, and a statement of all the incumbrances on the property, and all contracts entered into by it, and of its liability.² The court may, if it finds that it will be beneficial, dissolve the corporation.³ The corporation, after its dissolution, may prosecute an action in its corporate name for the use of a person entitled to receive the proceeds of such action, upon any and all causes of action accrued, or which but for such dissolution would have accrued, in its favor, in the same manner as if it were not dissolved.⁴ The corporation may also be sued by its corporate name.⁵ The court may, after having made an order dissolving the corporation, appoint a receiver; but an order made immediately upon the filing of the petition to dissolve is without validity. The power to appoint a receiver, under the provision authorizing a dissolution of a cor-

¹ O. Code, sec. 5651.

⁴ O. Code, sec. 5683.

² O. Code, sec. 5652.

⁵ O. Code, sec. 5684.

³ O. Code, sec. 5656.

poration, is independent of the regular statutory provision regulating the appointment of receivers generally.¹

Sec. 1011. Petition for dissolution of corporation.—

Plaintiffs represent that the — Company of C., Ohio, is a corporation duly organized under the laws of Ohio for manufacturing purposes, to wit, for the manufacture of [*state what*]; that its principal place of business is in the city of C., — county, Ohio; that the capital stock of said corporation is [*state what*], divided into — shares of \$— each; that — shares of said stock have been sold and are fully paid up.

Plaintiffs further say that they are stockholders and the owners of more than one-fifth in amount of the paid-up stock of said corporation. That said corporation has been in existence for — years; that for — years last preceding, the net earnings of said corporation have not been sufficient to pay in good faith an annual dividend of — per cent. over and above the salaries and expenses authorized by the by-laws and regulations of said corporation, and that they therefore desire a dissolution of said corporation.

Wherefore they pray that such proceedings may be had as are authorized by law in the premises, and for the appointment of a receiver to take charge of the assets and effects of such corporation, and for a dissolution of said corporation, and for such other and further relief to which they may be entitled.

NOTE.— See sec. 1010, *ante*. The action cannot be sustained without the requisite one-fifth of capital stock. *Harancourt Brewing Co. v. Armstrong*, 6 O. C. C. 468, pending in supreme court.

Sec. 1012. Change of name of corporation.— Directors or trustees of a corporation may file a petition in the court of common pleas of the county in which its principal office is located, or, if it has no principal office, in the county in which it is situate, for a change of name of such corporation. Thirty days' notice of the object and prayer of the petitioner shall be given by publication, and upon good cause shown the court may order the change of name as prayed for.² When the name shall have been so changed, the corporation shall thereafter be known by its new name, and shall have all the powers and be subject to the same restrictions as if no change of name had been made; and no such change of name shall affect the rights of such corporation, or of any individual or other corporation.³

¹ *Bacon, etc. Co. v. N. W. Stove Co.*
5 O. C. C. 289.

² R. S., sec. 5855.

³ R. S., sec. 5857.

Sec. 1013. Petition for change of name of corporation.—

Court of Common Pleas, — County, Ohio.

In the Matter of the Change
of Name of the L., B. &
B. Company, a Corpora-
tion under the Laws of
Ohio, *ex parte*. } Petition.

Your petitioners, W. S. B., W. J. B., W. G. B., S. C. B. and G. C. K., represent that they are the directors of the L., B. & B. Company, which is a corporation duly incorporated under the laws of the state of Ohio, having its principal office in the city of C., in said — county.

Your petitioners state that they desire to secure an order authorizing a change of the name of said corporation, and that there is good and sufficient cause therefor; that it is desired to change the name to the K., B. & B. Company.

Wherefore your petitioners pray that an order may be made changing the name of the said company to the K., B. & B. Company.

NOTE—Taken from court records.

Sec. 1014. Notice of application for change of name.—

Notice is hereby given that on the — day of —, 18—, — and —, the directors of the L., B. & B. Company filed their petition in the common pleas court of — county, Ohio, No. —, on the dockets thereof, praying that the name of the said corporation may be changed to "The K., B. & B. Company."

Said petition will be for hearing on or after the — day of —, 18—.

NOTE—Taken from court records.

Sec. 1015. Entry of change of name.

Court of Common Pleas, — County, Ohio.

In the Matter of the Change
of Name of the L., B. &
B. Company, a Corpora-
tion under the Laws of
Ohio, *ex parte*. } Entry.

This day this cause came on to be heard by the court upon the petition herein, and the court being satisfied by the proofs adduced by the said petitioners that they are the directors of the said corporation "The L., B. & B. Company," which is a corporation duly incorporated by the laws of this state, and located as stated in the petition; that thirty days' notice of

the object and prayer of said petition has been duly given by publication in —, a newspaper of general circulation in said — county, and that good cause has been shown the court why said name of said corporation should be changed as prayed for in the petition.

Whereupon it is ordered by the court that the name of said corporation, "The L. B. & B. Company," be and the same hereby is changed to "The K. B. & B. Company." Ordered further that said corporation pay the costs in this proceeding, taxed at \$—. In default thereof, let execution issue against said corporation therefor.

CHAPTER 72.

PROCEEDINGS IN AID OF EXECUTION.

Sec. 1016. Creditor's bill — What may be reached by.	Sec. 1019. Petition by judgment creditor against equitable assets.
1017. Creditor's bill — The petition.	1020. Creditor's bill — Defenses.
1018. Form of creditor's bill.	1021. Summary proceedings in aid of execution.

Sec. 1016. Creditor's bill — What may be reached by.— The equitable remedy in the nature of a creditor's bill has been incorporated into the code. When a debtor has not sufficient property to satisfy an ordinary execution, a judgment creditor may by a special proceeding reach any equitable interests in real estate, stocks, contracts, claims or choses in action, due or to become due, or any judgment or order, or any money, goods or effects in the possession of another.¹ The purpose of the code is to enable a judgment creditor to reach and apply every valuable property, right, title or interest, legal or equitable, which the debtor may possess, except anything which may be exempt under the statute, as the personal earnings of a debtor for three months preceding a levy.² A judgment creditor may subject to the payment of his claim any purchase-money due the debtor as vendor, and may enforce the lien to the same extent as could the vendor himself.³ And it may be had against a stockholder of a corporation for unpaid subscriptions,⁴ or salaries of municipal officers,⁵ or railroad trust or mortgage bonds.⁶ A fraudulent conveyance may be set aside and the property subjected to the payment of the claim of the judgment creditor.⁷ It will not lie to subject real estate occupied by virtue of a parol agreement for

¹ O. Code, sec. 5464.

⁵ Newark v. Funk, 15 O. S. 462.

² Snook v. Snetzer, 25 O. S. 516.

⁶ Means v. Railroad Co., 2 Disn.

³ Edwards v. Edwards, 24 O. S. 402. 465.

⁴ Henry v. Railroad Co., 17 O. 187;

⁷ Gormley v. Potter, 29 O. S. 597.

Ewin v. Railroad Co., 2 W. L. M. 41;

Warner v. Calendar, 20 O. S. 190.

life;¹ nor can it reach a claim on real property situate out of the jurisdiction,² nor equities against a county,³ nor money of one of two partners until the partnership property has been first exhausted.⁴ Different interests of a debtor against different persons may be reached by one bill.⁵ Although there is some conflict upon the question as to whether or not pension money can be reached on execution, the rule has been adopted in Ohio that it may.⁶ While money may be reached by a creditor's bill,⁷ it was not intended for the court to make an order for the payment of money by parties who were not before the court.⁸ Money due or to become due an author as royalty may be reached in the hands of a publisher.⁹ And so with money due upon a policy of insurance.¹⁰ The term "claim" as used in the code is comprehensive, and embraces a demand for money upon a contract express or implied, or for damages growing out of injury to person or property.¹¹

Sec. 1017. Creditor's bill — The petition.— This remedy, though intended to prevent failure of justice, should be resorted to only in cases of necessity, which should be apparent.¹² Before a creditor can pursue the remedy he must have obtained a judgment upon his claim.¹³ The course generally pursued is to have an execution issued upon the judgment and returned unsatisfied, although this is not considered indispensable. It is not therefore absolutely essential that the bill should aver that an execution has been issued and returned unsatisfied. It will answer if it be specifically averred that the judgment debtor has not sufficient real or personal property to satisfy the judgment.¹⁴ It is the fact and not the mere evidence thereof which must be made the basis of the action. The issuing of the execution being merely the evidence of

¹ Waggoner v. Speck, 8 O. 298.

² Butterfield v. Ogborn, 1 Disn. 550.

³ Boalt v. Commissioners, 18 O. 18.

⁴ Hubble v. Perrin, 8 O. 287.

⁵ Cadwallar v. Alexandria Soc. Co., 11 O. 292; Butler v. Birkey, 18 O. S. 514.

⁶ Fulwiler v. Infield, 6 O. C. C. 86.

⁷ Welch v. Railway, 1 W. L. M. 143.

⁸ Harmon v. Walter, 2 Clev. Rep. 186.

⁹ Lord v. Harte, 118 Mass. 271.

¹⁰ Insurance Co. v. Sears, 109 Mass. 388.

¹¹ Cincinnati v. Hafer, 49 O. S. 67.

¹² Hubble v. Perrin, 8 O. 287.

¹³ Clark v. Strong, 16 O. 317; Bomberger v. Turner, 13 O. S. 264.

¹⁴ Gilmore v. Miami Exporting Co., 2 O. 294; Bomberger v. Turner, 13 O. S. 264; Clark v. Strong, 16 O. 317; Piatt v. Bank, 6 O. 227.

the want of goods, the rule just stated necessarily follows. An allegation that a debtor has no goods, without the additional statement that he has no property sufficient to satisfy the judgment, will not answer.¹ The court is without jurisdiction if it appears that the debtor has other accessible property sufficient to satisfy the judgment.² The remedy may be pursued also where it appears that the property of a judgment debtor is so connected with equities or trusts that an adequate accounting cannot be had at law.³ In an action to subject the interest of a mortgagor in land it is not essential that a tender of the money due the mortgagee be made before selling the interest of the mortgagor.⁴ Nor is it necessary that a creditor make a previous demand upon his debtor to apply the property to the payment of the debt before bringing the suit.⁵ A creditor's bill to compel the payment of unpaid subscriptions to stock and to enforce the individual liability of a stockholder may be joined in one action.⁶ A lien in equity is acquired from the commencement of the proceedings in aid of execution, even though the creditor has not yet reduced his claim to judgment.⁷ A judgment debtor who fails to comply with an order to pay money, made in this proceeding, may be punished as for contempt.⁸ A receiver may sustain a proceeding in aid of execution.⁹

Sec. 1018. Form of creditor's bill.—

[*Caption.*]

On the — day of —, 18—, plaintiff, by the consideration of the court of —, obtained a judgment against the defendant C. D. for the sum of — dollars, with interest thereon at —, from the — day of —, 18—, and for costs in the sum of — dollars, which is wholly unpaid and unsatisfied and is a valid and subsisting judgment against the said defendant C. D. That the defendant C. D. is not the owner of any property, personal or real, upon which a levy of execution upon said judgment can be made sufficient to satisfy said judgment. [*Here describe and set forth the equitable interest of the defendant. R. S., sec. 5464.*]

Wherefore plaintiff prays that the said equitable interest

¹ Bank v. Oliver, 1 Disn. 159.

² Lee v. Harback, 2 W. L. M. 527.

³ Piatt v. Bank, *supra*.

⁴ Mattocks v. Humphrey, 17 O. 336.

⁵ Edgerton v. Hanna, 11 O. S. 323. 291.

⁶ Warner v. Callender, 20 O. S. 190.

⁷ Cincinnati v. Hafer, 49 O. S. 60.

⁸ In re Concklin, 5 O. C. 78.

⁹ Miller v. Mackenzie, 26 N. J. Eq.

may be sold and the proceeds applied to the payment of the said judgment.

Sec. 1019. Petition by judgment creditor against equitable assets.—

Now comes the plaintiff and says that on the — day of —, 18—, on his cross-petition in the case of C. S. W. against H. B. T. *et al.*, cause No. — of this court, he recovered a judgment against the defendant, S. L. C. T., in the sum of \$—, bearing interest at — per cent. from the — day of —, 18—, which judgment is still due, wholly unpaid and in full force and effect; that said S. L. C. T. has no property subject to execution or that can be reached by any process at law; that she is insolvent; that the defendant, the city of C., is indebted to her in a sum more than sufficient to satisfy plaintiff's said judgment as alleged by her in cause No. — in the common pleas court of this county.

Wherefore plaintiff prays that so much of the indebtedness due from said defendant, the city of C., to the said S. L. C. T. as may be sufficient to satisfy the judgment of the plaintiff against her, as aforesaid, with interest thereon and the costs of this action, may be subjected to the payment thereof; and that the defendant, the city of C., may be enjoined from paying anything to the said S. L. C. T. on account of her said claim against it until the judgment of the plaintiff as above set forth has been satisfied, and for all other and proper relief.

W. & W., Attorneys for Plaintiff.

NOTE.—From *Cincinnati v. Hafer*, 49 O. S. 60; 28 W. L. B. 181; R. S., sec. 5464. A claim for unliquidated damages for injury to real estate may be subjected. 49 O. S. 60. A creditor's bill will reach an undetermined liability. *Lord v. Harte*, 118 Mass. 271. A right of action or a present claim which will ripen into a cause of action may be reached. *Newark v. Funk*, 15 O. S. 462. See 8 Am. & Eng. Ency. of Law, p. 285; 2 Wait's A. & D. 250.

Sec. 1020. Creditor's bill — Defenses.—In an action by a judgment creditor to subject equities of a debtor, the latter cannot make a defense that the contract upon which the judgment was rendered was tainted with fraud, as such a course would be impeaching a judgment collaterally,¹ and no objections can be made to errors or irregularities in the original judgment.² It is otherwise as to a judgment rendered on a cognovit note.³ While a dormant judgment is conclusive between the parties, yet as it cannot be enforced by execution, it does not fall within the provision of the code so as to

¹ *Bank v. Stevenson*, 1 O. S. 233; *v. Railroad Co.*, 17 O. 187; *Swihart & Co.*, 6 O. S. 262. *v. Shann*, 24 O. S. 432.

² *Fah v. Taylor*, 10 O. 104; *Henry* ³ *Bank v. Stevenson*, 1 O. S. 233.

furnish a foundation for a proceeding in aid of execution.¹ A debtor of the execution debtor cannot relieve himself by a payment to the latter.² An answer by an heir to a suit by a judgment creditor to set aside a transfer on the ground of fraud, that he had in good faith made expenditures upon the premises for which he asks compensation in case the transfer be set aside, is good.³

Sec. 1021. Summary proceedings in aid of execution.—

The code provides a summary remedy which may be pursued independently of the creditor's bill, so called, either in the original action in which the judgment is rendered or in the probate court. When an execution has been returned unsatisfied in whole or in part, a judgment creditor may have an order from a judge of the probate or common pleas court requiring such debtor to appear and answer concerning his property.⁴ This order must be in writing signed by the judge making it and served as a summons.⁵ Or, an application may even be made in such a case before the return of the execution, when it is made to appear by affidavit or otherwise that the judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment, to have the debtor appear and answer concerning the same.⁶ And if there is any fear of his leaving the jurisdiction he may be arrested.⁷ If it be made to appear that the debtor has property which he refuses to apply to the judgment, he may be required to enter into an undertaking that he will appear for examination, and may be committed to jail as for contempt if he refuses.⁸ He shall not be excused from answering any questions which may be put to him.⁹ This does not apply to proceedings based upon discoveries brought in the probate court.¹⁰ The court may order any property of the judgment debtor, or any money due him which is not exempt, to be applied to the satisfaction of the judgment,¹¹ and may forbid any transfer or interference with the same.¹²

¹ *Simpson v. Hook*, 6 O. C. C. 27.

² *Bank v. Bank*, 6 O. S. 254.

³ *Bomberger v. Turner*, 18 O. S.

263.

⁴ O. Code, sec. 5472.

⁵ O. Code, sec. 5487.

⁶ O. Code, sec. 5473.

⁷ O. Code, sec. 5473.

⁸ O. Code, sec. 5474.

⁹ O. Code, sec. 5476.

¹⁰ *Good v. Patterson*, 40 O. S. 345.
See *Gilmore's Probate Practice*, p. 49.

¹¹ O. Code, sec. 5483.

¹² O. Code, sec. 5490.

CHAPTER 73.

QUO WARRANTO.

Sec. 1022. Nature of the action.

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1024. Usurpation of franchise.

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1035. Petition to forfeit franchise.

1036. Petition by private person for usurpation of office.

1037. The answer in quo warranto.

1038. Formal parts of answer.

Sec. 1022. Nature of the action.—At common law the proceeding in quo warranto was regarded as a criminal prosecution. The code has divested it of its criminal character and Americanized it as a civil action. Punishment cannot now be had unless the defendant is guilty of contempt.¹ In view of special works, the subject of this chapter will only be briefly discussed.²

Sec. 1023. Usurpation or forfeiture of office.—An action in quo warranto will lie against any person who usurps, introduces into, or unlawfully holds or exercises, a public office, civil or military, or an office of a corporation; or where a public officer does an act which by provision of law works a forfeiture of his office.³ It may be maintained against a person who assumes to act as an officer from a ward of a mu-

¹ State ex rel. v. McDaniel, 22 O. S. 361; State ex rel. v. Thompson, 84 O. S. 363.

² See a most excellent chapter in Spelling on Extraordinary Relief.

³ O. Code, sec. 6760.

nicipality which has no existence, or under an election held without authority of law;¹ but the action will not proceed if at the time of trial the term of office has expired, and no judgment of ouster can be pronounced.² It cannot be used as a means of contesting elections in place of the specific mode pointed out by the statute.³ Nor can the power of an executive officer to remove officials for misconduct be inquired into in this proceeding.⁴ The constitutionality of a law under which a person holds the office under a charge of usurpation may be determined.⁵ A person continuing in office after his term, under the belief that he is entitled to occupy the same until his successor is elected, is not a usurper.⁶ In rendering a judgment of ouster against an incumbent, the court will not adjudge in favor of another whose election is then in process of a regular contest.⁷ The legality of the election of trustees of a corporation is properly within the jurisdiction of quo warranto.⁸ And an election by stockholders of a corporation may be declared void and the officers elected ousted.⁹ Where a corporation or its officers refuse to allow newly-elected officers to take charge of the affairs of the company, the action will lie to require the corporation to recognize such newly-elected officers.¹⁰ The title of trustees of an incorporated religious society should not be questioned collaterally, but in a direct proceeding in quo warranto.¹¹ While the action will lie against an individual officeholder to determine his right to the office, it cannot be employed to abolish the office itself.¹²

Sec. 1024. Usurpation of franchise.—Quo warranto is the proper method to inquire into the usurpation of franchises,¹³ and all persons who claim to be entitled to a franchise may

¹ *State ex rel. v. O'Brien*, 47 O. S. 464; *State ex rel. v. Kearns*, 47 O. S. 566.

² *State ex rel. v. Jacob*, 17 O. 148.

³ *State ex rel. v. Morrow*, 15 O. S. 114.

⁴ *State ex rel. v. Hawkins*, 44 O. S. 96.

⁵ *State v. Covington*, 29 O. S. 102.

⁶ *Kriedler v. State*, 24 O. S. 22.

⁷ *State ex rel. v. Taylor*, 15 O. S. 187.

⁸ *Hullman v. Honcoup*, 5 O. S. 287.

⁹ *State ex rel. v. Bonnell*, 35 O. S. 10.

¹⁰ *State ex rel. v. Railway Co.*, 6 O. C. C. 415.

¹¹ *Presbyterian Society v. Smithers*, 12 O. S. 248.

¹² *State ex rel. v. Board*, 7 O. C. C. 152.

¹³ O. Code, sec. 6760; *State ex rel. v. Coke Co.*, 18 O. S. 262; *State ex rel. v. Lee*, 21 O. S. 662.

be made defendants to try their respective rights.¹ Where the franchise claimed to be usurped affects only private interests, the action will not lie upon the relation of the individual affected.² A charge against a corporation that it usurps certain franchises by acting through other parties, questions only the authority of the corporation, and not that derivable from the corporation which other parties exercise in their own right.³ The action to declare usurped franchises forfeited must be brought against the corporate body;⁴ and where a defendant sets up its corporate existence, the state cannot by replication deny its corporate capacity.⁵ Where the persons charged with usurping the franchise are so numerous that they are not brought before the court, but nevertheless plead without denying that they are corporators, and aver the existence of the corporation, they will be regarded as claiming to be members.⁶

Sec. 1025. Against persons unlawfully acting as corporation.—The action will lie against an association of persons acting as a corporation without being legally incorporated.⁷ For instance, a foreign insurance company exercising franchises and privileges without authority of law may be ousted therefrom by proceedings in quo warranto. And the issuance of a certificate by the state superintendent of insurance, being a ministerial and not judicial act, will not bar the proceedings where a corporation is charged with exercising a franchise without authority of law.⁸

Sec. 1026. Against corporations.—The action may be brought against a corporation which has offended against an act for its creation or renewal, or any act amendatory thereto;⁹ or where it has forfeited its privileges and franchises by non-user.¹⁰ The object of the proceeding against a corporation is to determine its right to the exercise of any or all of its

¹ O. Code, sec. 6767.

² Kenney v. Gas Co., 142 Mass. 417.

³ State ex rel. v. Cincinnati, 28 O. S. 445.

⁴ State ex rel. v. Gas Light, etc. Co., 18 O. S. 262; State ex rel. v. Taylor, 25 O. S. 280.

⁵ State ex rel. v. Coke Co., 18 O. S. 262.

⁶ State ex rel. v. Sherman, 22 O. S. 411.

⁷ O. Code, sec. 6760.

⁸ State ex rel. v. Insurance Co., 47 O. S. 167; State ex rel. v. Insurance Co., 49 O. S. 441.

⁹ O. Code, sec. 6761.

¹⁰ O. Code, sec. 6761.

franchises,¹ in which case the action should be brought against the corporation itself and not its individual members.² A corporation which has entered into a combination, such as a trust,³ or one which will prevent general competition,⁴ is liable to forfeiture. And so with one engaging in business other than that for which it was incorporated,⁵ or which has neglected or abused its franchise.⁶ But forfeitures not being favored in law, courts proceed with great caution, and will not so declare unless there is plain abuse or neglect of power.⁶ And where the corporate power has been abused in a manner not declared by statute to be a cause of forfeiture, it is left discretionary with the court as to whether or not it shall be ousted.⁸ But the court has no discretion where a corporation has been guilty of acts which are made a cause of forfeiture by statute.⁹ Where a corporation, called upon in quo warranto proceedings to show by what warrant it claims to be a corporation, pleads the act granting the corporate authority, the relator may by way of reply aver a cause of forfeiture and pray for a dissolution.¹⁰ And if a corporation has committed or omitted an act which amounts to a surrender of corporate rights, privileges or franchises, it will be ousted therefrom.¹¹ So where it appears that the certificate of incorporation does not comply with the requirements of the statute, the court may in its discretion oust the corporation of its franchise.¹² And so where it misused a franchise or privilege or right conferred upon it by law, or where it claims or holds by contract or otherwise, or has exercised a franchise in contravention of law,¹³ or is carrying on business without authority of law, quo warranto is the proper remedy.¹⁴ It may be ousted from

¹ State ex rel. v. Railroad Co., 50 O. S. 239.

² State ex rel. v. College, *supra*.

³ State ex rel. v. Taylor, 25 O. S. 279.

⁴ State ex rel. v. Building Ass'n, 35 O. S. 258.

⁵ State ex rel. v. Standard Oil Co., 49 O. S. 137.

⁶ State v. Canal Co., 28 O. S. 121.

¹⁰ State ex rel. v. Canal Co., *supra*.

¹¹ O. Code, sec. 6761.

⁴ State ex rel. v. Railway Co., 47 O. S. 180; Salt Co. v. Guthrie, 35 O. S. 672; Hoffman v. Brooks, 11 W. L. B. 358.

¹² State ex rel. v. Relief Ass'n, 29 O. S. 399.

¹³ O. Code, sec. 6761.

⁸ State ex rel. v. Railway Co., 40 O. S. 504.

¹⁴ People v. Insurance Co., 15 John. 358; Green v. People, 21 N. E. Rep. 625 (Ill., 1889).

⁶ State ex rel. v. College, 32 O. S. 487.

only such privileges as it may be exercising beyond its powers.¹ And the court may inquire into a franchise claimed to be exercised in contravention of law, and correct the mischief, even though the corporation exercising it is engaged in interstate commerce, and the misuse relates to that traffic.² While a proceeding in quo warranto may be used to determine the right of a corporation to exercise a franchise, it cannot be adopted to oust it from or to recover the possession of lands for private purposes.³ Nor can it be used as a vindication of the proprietary rights of an individual as against the claims of a corporation; the remedies of the individual against the corporation for the recovery of property being the same as against a natural person.⁴ Rights or liabilities of third parties who have acquired the same by dealing with the corporation cannot be determined, as the jurisdiction is at an end when forfeiture is declared.⁵ A corporation may be ousted from a privilege not conferred by law where the same has not been exercised for a term of twenty years.⁶

Sec. 1027. Who may commence the action.—The attorney-general of the state, upon his own motion, commences the action upon complaint made to him or otherwise.⁷ And the attorney-general or prosecuting attorney may do so when directed by the governor, the supreme court or general assembly.⁸ The prosecuting attorney cannot bring the action outside of his own county. While it is provided that the supreme court may direct the attorney-general to commence the action, this power should be exercised only when it relates to the business of the court or when its business renders it necessary or advisable.⁹ Or the action may be sustained by

¹State ex rel. v. Transportation State ex rel. v. Railway Co., 81 W. Co., 28 O. S. 166; State ex rel. v. L. B. 184.
 Railway Co., 47 O. S. 180.

²State ex rel. v. Railway Co., 47 O. S. 180. ³Society Perun v. Cleveland, 48 O. S. 481.

⁴State ex rel. v. Railroad Co., 28 49 O. S. 137. ⁵State ex rel. v. Standard Oil Co.,

N. E. Rep. 1051; 50 O. S. 239 (1893). ⁷State ex rel. v. Anderson, 45 O. S. 196.

It cannot be used for the recovery of real estate except when forfeited to the state. State ex rel. v. School Corporation, 56 Ind. 521. ⁸R. S., sec. 6762. Any member of the bar may be appointed to bring, when. R. S., sec. 6765.

⁹State ex rel. v. Railway Co., 83 N. E. Rep. 1051; 50 O. S. 239. See ⁹Thompson v. Watson, 48 O. S. 552; State ex rel. v. Taylor, 50 O. S. 120.

such officers upon leave of court on the relation of another person; ¹ as, for instance, an individual claiming an office from which he is unlawfully kept out by another.² But there is no authority for bringing the action on the relation of a private person other than that just given.³ Where the relator is a private person in his individual right, he is not required to obtain leave to file petition, but must bring it in the county where the defendant resides.⁴ A judgment in quo warranto rendered by a lower court, in an action brought by the prosecuting attorney, is not a bar to a subsequent action of a similar character by the attorney-general in the supreme court.⁵

Sec. 1028. Where brought.—Under the Ohio code an action in quo warranto can be brought only in the supreme court or in the circuit court of the county in which the defendants or one of the defendants lives; and if a corporation, where it has its place of business. But the attorney-general may bring the action in the circuit court of Franklin county.⁶

Sec. 1029. The petition in quo warranto.—The rule formerly was that the common-law system of pleading and not that of the code was followed in quo warranto proceedings, and therefore new matter set up in a replication in confession and avoidance of the plea was taken as confessed if not denied.⁷ But the code has provided the same pleadings in this as in other actions, allowing the defendant to demur or answer, setting up as many defenses as he may have, and giving the plaintiff the same right to demur to the answer or file a reply as in other cases.⁸ If the action be against a person for usurping an office, the petition should set forth the name of the person claiming to be entitled thereto, with an averment of his rights;⁹ but it has been held that if it be on the relation of the attorney-general to oust the incumbent of an office, the name of the person claiming the same need not be stated.¹⁰ An allegation in the petition that a member of a

¹ O. Code, sec. 6763.

⁶ O. Code, sec. 6768.

² O. Code, sec. 6764; Crawford v. State ex rel., 52 O. S. 62.

⁷ State ex rel. v. Taylor, 25 O. S. 279.

³ State ex rel. v. Taylor, 50 O. S. 120.

⁸ O. Code, sec. 6772.

⁴ State ex rel. v. Thompson, 34 O. S. 365.

⁹ O. Code, sec. 6766.

⁵ State ex rel. v. Coke Co., 18 O. S. 262.

¹⁰ State ex rel. v. Henmiller, 38 O. S. 101.

city council has wholly abandoned his seat as councilman does not state an issuable fact.¹ A petition against a board of education to show cause why they act as directors, and asking that they be ousted therefrom, states two causes of action, which should be taken advantage by a specific demurrer.² Where the action is brought on leave of court by a person claiming an office, the court may require notice to be given to a defendant before granting leave.³ When the petition is filed without leave, summons should be issued and served, and the issues are made up as in ordinary actions at law.⁴ If the summons is not served because the defendant cannot be found, service may be made by publication.⁵

Sec. 1030. Formal averments in quo warranto.—

[*Caption.*]

D. K. W., attorney-general of the state of Ohio, who sues for the said state in this behalf, comes here before the judges of the supreme [*or, circuit*] court of said state at the — term, 18—, and on the — day of —, 18—, at the term aforesaid, gives the court to understand and be informed:

That the defendant is a corporation duly formed and organized under the laws of this state; that ever since its organization it has continuously within this state, to wit, at the county of —, offended against the laws of this state, grossly abused and misused its corporate authority, franchises and privileges, and unlawfully assumed and usurped franchises and privileges not granted to it, and especially in the following particulars, to wit: [*Then follow with specifications.*]

Wherefore plaintiff prays that the defendant be adjudged to have its franchises as a corporation forfeited and be ousted therefrom, or at least from such franchises as it has unlawfully assumed or which have been abused by it.

NOTE.—State ex rel. v. Mutual Relief Ass'n, 29 O. S. 399.

Sec. 1031. Petition to oust foreign insurance company.—

[*Caption.*]

D. K. W., attorney-general of the state of Ohio, who sues for the said state in this behalf, comes here before the judges of the supreme court of said state, at the term of —, 18—,

¹State ex rel. v. Kearns, 47 O. S. 556.

²State ex rel. v. Board, 7 O. C. C. 152.

³O. Code, sec. 6769.

⁴O. Code, sec. 6770. See In re Bank, 5 O. 249.

⁵O. Code, sec. 6771. If none of several defendants are found in the county, where the case is prosecuted in the circuit court, and no appearance is entered, they may be constructively served by publication. State ex rel. v. Smith, 6 O. C. C. 410.

and on the — day of —, 18—, at the term aforesaid, gives the said court to understand and be informed that the defendant is a corporation organized under the laws of the state of —, for the purpose of carrying on, upon the assessment or co-operative plan, the business of insuring the lives of its members, and of providing to its members indemnity for disability by accident; that since the — day of —, 18—, the defendant has exercised, and claims the right to exercise, in this state, the privilege and franchise of transacting the business of insuring lives upon the assessment plan, which it is not entitled to do; because neither it, nor any of its agents, have obtained from the superintendent of insurance of this state the necessary certificate of authority or license to do business in this state as required by law; and also because, by the statutes of the state of —, corporations organized under the laws of Ohio, for the purpose of insuring the lives of members upon the assessment plan, are not permitted to do business in said state of — upon the same basis and limitations as they are in this state. The statutes of said state of — upon this subject provide: [*Set out the provisions.*]

That the commissioner of insurance of the state of — has refused, and still refuses, to issue to such Ohio corporations who are insuring lives upon the assessment plan his certificate of authority to transact business in that state.

Your relator therefore prays that the defendant be ousted from the exercise of the functions and franchises conferred upon it by the state of — within this state.

NOTE.—See R. S., sec. 8630. The prayer calls for the proper judgment to be made in such cases. State ex rel. v. W. U. M. Life Ins. Co., 47 O. S. 167.

Sec. 1032. Petition to test the rights of two contesting public boards by members upon refusal of proper officer.

[*Caption.*]

L. R., E. W. D. and W. M., who sue for the state of Ohio in this behalf, J. C. S., prosecuting attorney of — county, Ohio, having refused upon request so to do, come here before the judges of the circuit court of said county, and on the — day of —, 18—, give said court to understand and be informed that they, the said relators, together with said J. D. E. and G. B. K., are duly appointed and qualified members of the board of public improvements of the city of C., — county, Ohio, having been appointed to said office by the governor of the state of Ohio on the — day of —, 18—, pursuant to an act of the general assembly, entitled “—,” passed —, 18—, and these relators, together with said J. D. E. and G. B. K., constitute the members of said board of public improvements; and that as members of said board, the said L. R., E. W. D. and W. M., together with said J. D. E. and G. B. K., held and exercised all and singular the rights, liberties and

franchises of members thereof until the — day of —, 18—, when the said defendants, T. G. S., T. W. G., M. F. and G. T., without any lawful warrant, grant, right or charter, forcibly took possession of and usurped the liberties, privileges and franchises aforesaid, and excluded the relators therefrom, and proceeded to and do now hold and exercise the liberties, privileges and franchises pertaining to the members of the said board of improvements, all of which they have usurped, and do now usurp, upon the state of Ohio, to its great damage and prejudice. That the said J. D. E. and G. B. K., having refused upon request to join as plaintiffs or relators herein, have been made defendants.

Whereupon the relators pray the advice and judgment of the court and due process of law against the several persons above named as defendants in this behalf, and that the said T. G. S., T. W. G., M. F. and G. T. be compelled to answer to the state of Ohio, and show by what warrant they exercise the liberties, privileges and franchises aforesaid, and that they be ousted from the same, and the relators, together with said defendants, J. D. E. and G. B. K., be restored thereto.

F. & K. and P. & S., Attorneys for Plaintiffs.

NOTE.—From *State ex rel. v. Smith*, 48 O. S. 211. See averments in *State ex rel. v. Judges*, 21 O. S. 1.

Sec. 1033. Petition by prosecuting attorney for usurpation of office.—

A. B., prosecuting attorney for the county of — in the state of Ohio, on the relation of C. D., of said county, comes now here and gives the court to understand and be informed that on the — day of —, 18—, at a general election then held in the county of — and state of Ohio, for the election, among other officers, of a — for said county, for the term of — years from the — day of —, 18—, one E. F. received the highest number of legal votes for said office and was duly elected thereto, and on the — day of —, 18—, duly qualified as such and is now entitled to hold said office.

That on the — day of —, 18—, the said C. D. usurped said office and has ever since withheld the same from the said E. F.

Wherefore he prays the court that the defendant be ousted from said office and the possession thereof be given to the said E. F.

Sec. 1034. Petition by prosecuting attorney against persons assuming to act as a corporation.—

[*Averment as in ante, sec. 1030.*]

That the defendants C. D., E. F. and G. H., without having been incorporated, are and have been for — last past usurping the franchise of being a corporation by the name of —,

and by that name of pleading and being impleaded, answering and being answered, contracting and being contracted with, and of acquiring, holding, using, selling and conveying and otherwise disposing of real and personal property as well within as without the state of Ohio.

Wherefore the relator prays the court that the defendants be required to show by what right, if any, they claim to have, use and enjoy the liberties, privileges and franchises aforesaid, and that they be ousted from using the same.

Sec. 1035. Petition to forfeit franchise.—

[*Averment as in ante, sec. 1030.*]

That the defendant, the — Company, is a corporation duly organized under the general laws of the state of Ohio for the incorporation of railway companies, and has been since the — day of —, 18—.

That, as such corporation, it has continuously since said date, within this state, misused its corporate authority, franchises and privileges, and assumed franchises and privileges not granted to it, in this, to wit: That it has exercised, without any warrant, charter or grant, the franchise of banking, and has received deposits, made discounts and transacted other banking business to which it was not authorized, and has exercised the franchises of a banking corporation not conferred upon it by law.

Wherefore the relator prays that the defendant be adjudged to have forfeited its franchises and be ousted therefrom or from the franchises so unlawfully assumed and abused by it.

NOTE.—See averments in *State ex rel. v. Gas Light & Coke Co.*, 18 O. S. 262.

Sec. 1036. Petition by private person for usurpation of office.—

The State of Ohio ex rel. A. B. }
 vs.
 C. D. }

A. B. now comes and gives the court to understand and be informed:

That the relator was, on the — day of —, 18—, and has ever since been, a resident of the county of —, and state of Ohio, over the age of twenty years, and eligible to be elected to and hold the office of — thereof.

That on the — day of —, 18—, at a general election held in said county for the election, among other officers, of — thereof, the relator and defendant were the only candidates for said office, and the relator, at said election, received the highest number of votes for said office, and was duly elected thereto for the term of — years from the — day of —, 18—.

That on the — day of —, 18—, the relator was duly commissioned by the governor of the state as such —, and on the — day of —, 18—, duly qualified as such.

That on the — day of —, 18—, the defendant usurped the said office of —, and has since held and received the fees and emoluments thereof, amounting to the sum of — dollars, and has, during the said time, wrongfully and unlawfully kept the relator out of the possession of said office, and deprived him of the said fees and emoluments, to his damage in — dollars.

That on the — day of —, 18—, the relator demanded of the defendant the possession of said office, and the books and papers belonging thereto, which was refused.

Wherefore the relator demands judgment for — dollars damages; and that the defendant be ousted from said office, and that the relator have possession thereof awarded him.

NOTE.—R. S., sec. 6764; *ante*, sec. 1023.

Sec. 1037. The answer in quo warranto.—A defendant may demur or answer and set up as many defenses as he may have;¹ and the range of inquiry is limited to charges in the information, matters set up by way of plea being material only so far as it may show a warrant in law for the exercise of the authority alleged in the information to be usurped.² An answer to an action in quo warranto to test the right of a person to hold an office should show a complete legal right to enjoy the privileges thereof,³ and the respondent should answer precisely by what statutory authority he exercises its functions.⁴ Where the charge is a continued usurpation, the answer should set out expressly the continuance of every qualification necessary to the enjoyment of the office, as the same are not presumed to exist from a mere statement of the qualifications at the time of the appointment.⁵ An answer that the defendants have for twenty years exercised the franchise which they are accused of usurping is valid under the statute.⁶ If a defendant admits that upon the face of the returns the plaintiff was elected to the office in question, but

¹ R. S., sec. 6772. He may set up several defenses as in other actions. *State ex rel. v. McDaniel*, 22 O. S. 354.

⁴ *State ex rel. v. Tillman*, 82 Neb. 789.

² *State ex rel. v. Cincinnati*, 23 O. S. 445.

⁵ *State ex rel. v. Beecher*, 15 O. 723.

⁶ *State ex rel. v. Exporting Co.*, 11 O. 126; *State ex rel. v. Standard Oil*

³ *Enterprise v. State*, 29 Fla. 128; *Co.*, 49 O. S. 137. 10 So. Rep. 740.

alleges that the same was obtained by fraud and illegal votes, unless he supports his claim by testimony, judgment will be rendered for plaintiff.¹

Sec. 1038. Formal parts of answer.—

And now comes the respondent, the city of H., and for answer to the information herein exhibited against this respondent by the attorney-general of the state of Ohio, says: [*State defenses.*]

Wherefore respondent says that it does not usurp, or without warrant or authority use or exercise, any of said liberties, privileges or franchises, and asks that said information be dismissed, and that it recover its costs herein, and for such other relief as may be just and right in the premises.

Sec. 1038a. Reply.—Where a defendant corporation pleads an act of the legislature under which it claims to exercise certain powers, it is competent and not a departure for the relator by reply to aver a cause of forfeiture, and to pray for a judgment of dissolution.²

¹ Brown v. Jeffrey, 42 Kan. 605.

² State ex rel. v. P. & O. Canal Co., 22 O. S. 121; State ex rel. v. Road Co., 13 O. C. C. 375; 7 Oh. Dec. 453.

CHAPTER 74.

REAL ACTIONS, INCLUDING ACTIONS TO QUIET TITLE, RECOVERY OF POSSESSION, AND OTHER ACTIONS RELATING TO REAL ESTATE.

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| <p>Sec. 1039. Action to quiet title—Parties and petition.</p> <p>1040. Petition to quiet title.</p> <p>1041. Action to quiet title—Defenses.</p> <p>1042. Action to recover purchase-money.</p> <p>1043. Petition against purchaser of realty for failure to complete purchase.</p> <p>RECOVERY OF POSSESSION OF REAL ESTATE.</p> <p>Sec. 1044. Parties plaintiff in actions to recover real estate.</p> <p>1045. Parties defendant in actions to recover real estate.</p> <p>1046. Recovery of possession of land—Ejectment—The petition.</p> <p>1047. Petition for possession merely.</p> <p>1048. Petition for possession and rents.</p> <p>1049. Petition for possession and damages.</p> <p>1050. Action to recover possession of real estate—Defenses.</p> | <p>Sec. 1051. Answer denying ownership, possession, etc.—Claiming adverse possession for twenty-one years.</p> <p>1052. Answer of <i>bona fide</i> purchaser without notice.</p> <p>1053. Another form of denial.</p> <p>1054. Answer and cross-petition for recovery of possession.</p> <p>1055. Occupying claimants—When allowed for improvements.</p> <p>1056. Pleading by occupying claimant.</p> <p>1057. Petition to complete contract.</p> <p>1058. Petition to sell entailed and other estates.</p> <p>1059. Petition for sale of real estate under a transcript judgment from justice.</p> <p>1060. Petition against city for recovery of value of real estate unlawfully appropriated without making appropriation.</p> |
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Sec. 1039. Action to quiet title.—The statutory action to quiet title may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest.¹ It is not nec-

¹O. Code, sec. 5779; 90 O. L. 226. 237; Kansas Code, sec. 594; Oreg. Sec pp. 944-5, n. 1. Colo. Code, sec. Code, sec. 500, are the same. See

essary that the adverse claim should relate to or affect the right of present possession.¹ One tenant in common in actual possession may maintain an action to determine the validity of an adverse title by a co-tenant.² And so may a judgment creditor sustain the action to clear away a cloud cast on the title by a sale;³ or an executor authorized to sell realty to pay debts.⁴ The action will also lie to quiet title against tax-sale and ditch assessments upon the ground that they are illegal and void.⁵ It will not lie for a trespass;⁶ nor can a vendee of a judgment debtor who has taken a conveyance of real estate, but has not paid the purchase-money therefor, sustain an action against a purchaser, if judgment was rendered after the contract of sale, unless he has paid or brings the purchase-money into court.⁷ Where a purchaser of land mortgages the premises, but fails to pay the purchase-money, agrees with the mortgagee to give up his interest, and yields possession to a person authorized by the mortgagee to receive it, the latter may, after having paid for the land and taken a deed therefor, sustain an action to quiet title against the original purchaser.⁸ A petition alleging that plaintiff is the owner in fee and in possession of certain described premises which are bounded on the north by a designated line, up to which he was in possession, and that the defendant claimed to own a parcel of land immediately south thereof, sufficiently states a cause of action to quiet title.⁹

When the action is prosecuted under the code it has been universally conceded, and such has been the practice, that it is not essential that the plaintiff allege ownership and legal title himself, but only possession.¹⁰ In a recent case brought under the code, one of the Ohio circuit courts stated that the petition should allege the ownership and possession which entitle the plaintiff to hold title and possession in peace, from

Bryant's Code Pleading, Table of Code References, Parties, and Petition.

¹ Rhea v. Dick, 34 O. S. 420.

² Ross v. Heintzen, 36 Cal. 813.

³ Myers v. Hewitt, 16 O. 449.

⁴ Laverty v. Sexton, 41 Ia. 485.

⁵ Peck v. Watros, 30 O. S. 590.

⁶ Sloan v. Bienmiller, 34 O. S. 492.

⁷ Butler v. Brown, 5 O. S. 211.

⁸ Nolan v. Urmston, 18 O. 273.

⁹ Bailey v. Hughes, 35 O. S. 597.

¹⁰ Rhea v. Dick, 34 O. S. 420. "In an action to quiet title, an averment of title is not necessary; averment of possession in the words of the statute is sufficient." Lusby v. Jones, 31 W. L. B. 70 (Cin. Super. Ct., 1903).

which the duty of the defendant not to cast the cloud upon it or to interfere with the possession arises. But as the principal question in controversy in that case was as to the necessary allegation as to the nature of the title and claim of the defendant, the statement as to its being necessary to allege ownership is not entitled to so much consideration. Though it may not be essential to allege legal title, it is done in practice, and is a natural allegation to make, as well as safe and commendable.¹ But an equitable action may be prosecuted independently of statute, and a party pursuing that course must be more explicit in his statement of facts. In such cases it is considered essential that the plaintiff allege ownership of the legal title, and the facts must be fully stated, substantially as in a bill in equity under the former chancery practice.² Under this rule, a person holding the legal title, though not in possession, may maintain a suit to remove a cloud, and hence it is not necessary in such case to allege that the plaintiff was in possession;³ for example, a person holding legal title to uncultivated lands, though not in possession,⁴ or of premises vacant and unoccupied.⁵ Under the statute, a person is in possession even though occupying by a tenant.⁶

By virtue of a recent amendment to the Ohio code the

¹ *Lamb v. Boyd*, 4 O. C. C. 499, 500. Generally the action must be brought by one in possession with a legal title, but under the code a holder of an equity in possession may maintain the action. *Mains v. Henkle*, 8 W. L. M. 593. Plaintiff must be in possession (*Harvey v. Jones*, 1 Disn. 65), and must allege actual possession by himself or tenant. *Thomas v. White*, 2 O. S. 540; *Harvey v. Jones*, 1 Disn. 65; *Ellithorpe v. Buck*, 17 O. S. 72; *Douglas v. Nuzum*, 16 Kan. 515; *Clark v. Hubbard*, 8 O. 382. Possession under bond or deed is sufficient. *Thomas v. White*, 2 O. S. 540. Naked possession in the absence of proof of title paramount in the defendant is sufficient. *Waterson v. Ury*, 5 O. C. C. 347. To constitute adverse possession it will

be sufficient if there be an assertion of ownership and unbroken possession for a certain length of time. *Herff v. Griggs*, 121 Ind. 471. The plaintiff must have acquired a legal title. *Thomas v. White*, 2 O. S. 540. It is not necessary that the adverse claim should relate to the present possession. *Rhea v. Dick*, 84 O. S. 420; *Collins v. Collins*, 19 O. S. 468.

² *Douglas v. Nuzum*, 16 Kan. 515; *Story's Eq. Jur.*, sec. 700-706; *Petit v. Shepherd*, 5 Paige, 501; *Field v. Holbrook*, 6 Duer, 597; *Junes v. Smith*, 22 Mich. 360; *Pier v. Fond du Lac*, 88 Wis. 471.

³ *Grove v. Jennings*, 46 Kan. 366; *Lejeune v. Harmon*, 29 Neb. 263.

⁴ *Lejeune v. Harmon*, *supra*.

⁵ *Douglas v. Nuzum*, 16 Kan. 515.

⁶ O. Code, sec. 5772.

action may be brought by a person out of possession, having or claiming an estate or interest in remainder or reversion in real property,¹ in which case it is obviously necessary that the plaintiff set forth the nature of his title or interest.

Upon the question of the proper allegations to be made with reference to the adverse claim the rule has been variously declared. While some courts consider it unnecessary to state with great particularity the nature of the title or interest of the defendant, yet it has been uniformly held that the petition should show that the claim of the defendant is adverse, unfounded, and that it is a cloud upon the title of plaintiff.² But if the plaintiff undertakes to specifically set forth the claim of the defendant and thereby shows that defendant's title is the better one, it will be demurrable.³ It is not necessary to show that the defendant's title is one which would be *prima facie* good at law.⁴ An allegation that defendants are not precluded by law from the possession of the premises, being a legal deduction, is immaterial, if it otherwise appears that the plaintiff had, by the length of his possession, acquired a valid title.⁵ The facts which show actual wrongs or anticipated mischiefs which should be prevented,⁶ or the apparent validity of an instrument said to constitute the cloud, as well as facts showing its invalidity, should be stated.⁷ An allegation that the defendant claims to hold land under certain deeds which are without foundation in law, the petition setting forth no further facts tending to show invalidity, is not sufficient.⁸

The rule adopted in the equitable suits as to a statement of the nature of the adverse claim is the better mode of pleading, in both the code action and equitable suit; that is, facts

¹ Whittaker's 4th Rev. Ed. Ohio Civil Code, p. 445, sec. 5779.

² Marott v. Germania Ass'n, 54 Ind. 37; Railroad Co. v. Oyler, 60 Ind. 383; Schori v. Stevens, 63 Ind. 441. It may be sufficient if the facts pleaded show that the claim is inconsistent with the title of plaintiff. Kitts v. Wilson, 106 Ind. 147. It need only disclose whether the title be legal or equitable, and, if equitable, all facts establishing the same

may be set out. Griesom v. Moore, 106 Ind. 296; 55 Am. Rep. 743.

³ McPheeters v. Wright, 110 Ind. 519.

⁴ Holbrook v. Winsor, 38 Mich. 394.

⁵ Buchanan v. Roy, 2 O. 3. 251.

⁶ Bailey v. Briggs, 56 N. Y. 407.

⁷ Hibernian Saving Society v. Ordway, 38 Cal. 679.

⁸ Page v. Kennan, 92 Wis. 520. But see rule in foreclosure, *ante*, sec. 74.

sufficient to show the nature of the defendant's claim should be set forth. The pleader should set out exactly the nature of defendant's title, and the relief sought against him, so that the court may determine judicially whether it is valid or not.¹ This is especially necessary where service is made upon the defendants by publication.² In such cases, where the allegation is that the defendant claims an estate or interest in the premises adverse to plaintiff, and there is no answer filed setting forth the nature of the defendant's claim, the pleadings do not disclose facts sufficient to state a cause of action. Where a person, though not in possession, discloses such a state of facts in reference to a disputed boundary line as will bring the case within the recognized doctrines of equity, it will entitle him to a decree quieting and freeing his title therefrom.³

Sec. 1040. Petition to quiet title.—

Plaintiff alleges that he is [the owner in fee-simple, and] in the actual possession and occupancy, of the following described premises, situate in the city of — [or, township], county of —, and state of —, to wit: [*Description*]. [*It may be alleged that plaintiff's title thereto is derived as follows: As in Rhea v. Dick, 34 O. S. 420.*]

That the defendant claims some interest in said premises adverse and hostile to plaintiff in this, to wit: [*Briefly state defendant's claim.*]

Defendant has no claim or interest in the said premises whatever, and the claim he makes is unfounded, and is a cloud upon plaintiff's title.

Plaintiff therefore prays that his title to said premises be quieted and that the defendant be forever barred from having or claiming any right to said premises, and for such relief as seems necessary and equitable.

Sec. 1041. Action to quiet title — Defenses.—The defendant may take issue with the plaintiff and claim that he is the legal owner and in possession of the land in dispute and ask that his title be quieted.⁴ An answer denying that the plaintiff lawfully entered or is in lawful possession is not a denial of any fact and not sufficient;⁵ and so with an answer which admits the plaintiff's possession but avers that the same is un-

¹ *Lamb v. Boyd*, 4 O. C. C. 500;
Douglas v. Nuzum, 16 Kan. 515.

² *Lamb v. Boyd*, *supra*; *Commissioners v. Welch*, 40 Kan. 767.

³ *Pattison v. Jordan*, 8 O. C. C. 283.

⁴ *Ellithorpe v. Buck*, 17 O. S. 72;
Parish v. Ferris, 6 O. S. 563.

⁵ *Baldwin v. Rees*, 8 Am. Law Rec. 556.

lawful.¹ A person may be estopped, however, by long acquiescence or silence from questioning the validity of a deed of another who has had possession of the premises.² An objection that the plaintiff has a remedy by ejectment should be taken advantage of by demurrer or answer.³ A person claiming an equitable title may, upon a proper showing, be made a party defendant.⁴ If an answer does not deny the allegations in the petition, but sets up a claim to a specific title, the evidence must be confined to that title, unless his answer also contains a denial of the allegations of the petition, then other evidence may be admitted.⁵

Sec. 1042. Action to recover purchase-money.—In an action by a vendor for a recovery of purchase-money, the code permits the vendee to set up any breach of covenant and make any person claiming an adverse interest or title a party, and he may be allowed any damages sustained by reason thereof.⁶ But where the vendee is in peaceable possession under a deed claiming covenant of warranty, he must, if he seeks to defeat a recovery by reason of an outstanding title, show an eviction.⁷ The right to make a person claiming an adverse interest a party exists only where there has been a breach of covenants in the conveyance.⁸

Sec. 1043. Petition against purchaser of realty for failure to complete purchase.—

That on the — day of —, 18—, the plaintiff and defendant entered into a contract, in writing, a copy of which is hereto attached, marked "Exhibit A," whereby plaintiff sold to the defendant the following premises: [*Description.*] It was stipulated and agreed in said contract that said defendant should pay for said premises the sum of \$—, the money to be paid and the deed delivered on the — day of —, 18—.

That on said day the plaintiff tendered to the defendant a good and sufficient warranty deed of conveyance of said land, free and clear of all claims and incumbrances, upon the pay-

¹ Waterson v. Ury, 5 O. C. C. 347.

² Bridenbaugh v. King, 42 O. S. 410.

³ Bourman v. Sunnuchs, 42 Wis. 235; Gray v. Tyler, 40 Wis. 579.

⁴ Hampson v. Fall, 64 Ind. 332.

⁵ Morrill v. Douglas, 14 Kan. 293.

⁶ O. Code, sec. 5780.

⁷ Purcell v. Henny, 28 O. S. 39. The covenant of seizin is not broken until eviction. See *ante*, sec. 477; Great Western Stock Co. v. Saas, 24 O. S. 542.

⁸ Cincinnati v. Brachman, 35 O. S. 289.

ment by said defendant of the sum of \$—, in accordance with the terms of said contract.

That the defendant neglected and refused to pay the purchase-money of said land, and has wholly failed to comply with the terms of said contract.

That the plaintiff has sustained damages in the sum of \$—.

[*Prayer.*]

RECOVERY OF POSSESSION OF REAL ESTATE.

Sec. 1044. Parties plaintiff in actions to recover real estate.—Tenants in common may under the code maintain a joint action for the recovery of the possession of real estate.¹ Some courts hold that one cannot maintain the action for the recovery of the whole premises but all should join; or each may bring a separate action for the recovery of his particular share,² while still others hold that one tenant in common may recover the entire common property as against a stranger.³ The action may be brought by a reversioner where a life-tenant has suffered the land to be sold for taxes,⁴ or by pretermitted heirs for a share or inheritance in the land of their parents;⁵ prior possession of an ancestor being presumptive evidence of title is sufficient for heirs to maintain the action against an intruder;⁶ or by a personal representative for the recovery of land fraudulently conveyed by a decedent,⁷ or by a county for lands which it owns,⁸ or by a trustee.⁹ Under former provisions a husband entitled to curtesy could maintain the action to recover land which belonged to his wife upon her death.¹⁰ It has been held that a person holding title

¹ O. Code, sec. 5005; *Alford v. Cracken v. McCracken*, 67 Mo. 591; *Dewin*, 1 Nev. 207.

² *Hasbrouck v. Bunce*, 62 N. Y. 475.

³ *Winthrop v. Grimes*, W. 330; *Dolph v. Barney*, 5 Oreg. 198; *Hart v. Robinson*, 21 Cal. 346; *Stark v. Barrett*, 15 Cal. 371; *Touchard v. Crow*, 20 Cal. 162. One tenant in common may maintain the action against his co-tenant. *White v. Sayre*, 2 O. 110; *Penrod v. Danner*, 19 O. 218.

⁴ *McMillan v. Robbins*, 5 O. 28.

⁵ *Pounds v. Dale*, 48 Mo. 270; *Mo-*

⁶ *Ludlow v. McBride*, 8 O. 244.

⁷ O. Code, sec. 6140. See *Spoors v. Coen*, 44 O. S. 477. But this right can be exercised only so far as it may be necessary to sell the land to pay debts. *Humphreys v. Taylor*, 5 Oreg. 260; *Kirk v. Carr*, 54 Pa. St. 285.

⁸ *Lincoln Co. v. McGruder*, 8 Mo. App. 814.

⁹ *Moore v. Burnett*, 11 O. 334.

¹⁰ *Hall v. Hall*, 82 O. S. 184.

merely by adverse possession may bring the action.¹ In Ohio a person seeking the recovery of real property must be the owner of the legal estate therein; hence the action may be sustained by a mortgagee after condition broken, as the legal title then is vested in the mortgagee.³ A person holding premises under a contract of purchase is not possessed of a legal estate and can not therefore maintain the action.⁴ Nor can trustees of a religious society holding legal title maintain a suit in equity to establish title against defendants who claim a better title as the lawful trustees of such society.⁵ A person having exclusive title should not join with him those having no title.⁶ Nor can two persons claiming the whole or a parcel of land by a title hostile to each other unite as plaintiffs against a third person in possession.⁷

An action to recover property belonging to an imbecile must be brought by the guardian, or by a next friend.*

Sec. 1045. Parties defendant in actions to recover real estate.—The action being a possessory one should be brought against the occupant and not those who are not in possession at the commencement of the suit,⁸ although a person who claims and defends the title of a tenant in possession is a proper defendant.⁹ Several parties who occupy different parts of land should not be joined as defendants.¹⁰ Where the land is in possession of a tenant the landlord is a necessary party, as is also the tenant so long as his tenancy continues.¹¹ Where several defendants defend jointly, judgment may be rendered for or against one or more of them.¹² A person who has been

¹ *Hackett v. Marmet Co.*, 53 Fed. Rep. 268.

² O. Code, sec. 5781. See sec. 1046, *post*.

³ *Malloy v. Malloy*, 35 Neb. 224; 52 N. W. Rep. 1097; *Kerr v. Lydecker*, 51 O. S. 240, 250; *Ely v. McGuire*, 2 O. 223 (1826). And so in New York. *Murray v. Walker*, 31 N. Y. 399.

⁴ *Malloy v. Malloy*, 35 Neb. 224.

⁵ *Harper v. Crawford*, 18 O. 129. See *Church v. Smithers*, 12 O. S. 248.

⁶ *Adams v. Turner*, 7 O. (Pt. 2), 478.

⁷ *Hubble v. Learch*, 58 N. Y. 28.

⁸ *Garner v. Marshall*, 9 Cal. 268.

⁹ *Abeel v. Van Gelder*, 86 N. Y. 513.

¹⁰ *Dillaye v. Wilson*, 48 Barb. 261.

¹¹ *Finnegan v. Caraher*, 47 N. Y. 493.

A tenant or sub-tenant cannot controvert the landlord's title, but may show that it terminated after the execution of the tenant's lease. *Devacht v. Newsam*, 3 O. 57. Where a landlord is made a party the plaintiff cannot insist upon joining the tenants under him. *Doe v. Roe*, 4 O. 485.

¹² *Humphries v. Hoffman*, 83 O. S. 895.

* *Row v. Row*, 53 O. S. 249.

made nominally a defendant may upon motion amend the petition so as to make a party a co-plaintiff instead of a defendant.¹ But one not connected with the right of possession claimed by the plaintiff, but asserting paramount title to both defendant and plaintiff, cannot intervene.² Under the code, however, any person claiming an interest in the property may on application be made a party.³

Sec. 1046. Recovery of possession of land — Ejectment —
The petition.—The action for the recovery of real property under the code supersedes the old action of ejectment, although it is the same in substance.⁴ A federal court in a case recently brought under the Ohio code has likened it unto the common-law ejectment, and held that questions cannot be brought into the action, either by plaintiff or defendant, which are of an equitable character involving equitable remedies.⁵ This principle, however, takes us back to the old forms; and although there may have been reasons for the statement in the particular action mentioned, yet the statements of the court are too broad to be in harmony with the liberality of the code. Under the code none of the technical allegations peculiar to the old action of ejectment are necessary.⁶ It is true that so far as the plaintiff is concerned he must recover, if at all, upon his legal title,⁷ but it is otherwise as to the defendant.⁸ The petition under the code must aver that the plaintiff has a legal estate in the premises sought to be recovered.⁹ It is not es-

¹ Clark v. Clark, 20 O. S. 128.

² Porter v. Garrissino, 51 Cal. 559; Files v. Watt, 28 Ark. 151; Colgrove v. Koonce, 76 N. C. 363.

³ O. Code, sec. 5014.

⁴ Smith v. Findlay, 2 Handy, 69; Young v. Board, 51 Fed. Rep. 585.

⁵ Young v. Board, 51 Fed. Rep. 585.

⁶ Payne v. Tredwell, 16 Cal. 223.

⁷ Young v. Board, 51 Fed. Rep. 585; O. Code, sec. 5781.

⁸ See sec. 1050, *post*.

⁹ O. Code, sec. 5781. To entitle plaintiff to recover he must possess a legal estate in the premises. Dale v. Hunneman, 12 Neb. 221; O'Brien v. Gaslin, 20 Neb. 347; Malloy v. Malloy,

85 Neb. 227. In Kansas any kind of title, legal or equitable, is sufficient. Simpson v. Boring, 16 Kan. 248. Recovery may be had for any portion. Everett v. Lusk, 19 Kan. 195. Or for any interest he may prove less than his claim. Treon v. Emerick, 6 O. 392 (1834). Or upon possessory title alone where no better is set up by the defendant. Ludlow v. Barr, 8 O. 407; Abram v. Will, 6 O. 164; Devacht v. Newsam, 8 O. 57. Legal title will prevail where the equities are equal. Evans v. Land Co., 21 S. W. Rep. 670 (Tenn., 1893). An action by the owner of the legal title for the recovery of land held under contract

essential that the exact language of the statute be adopted in the petition, as that he has a legal estate therein, but any ordinary and concise language meaning the same thing will answer.¹ It is said, too, that title may be averred in general terms,² although a general allegation must yield to a specific one; and if the specific allegation does not show title the petition is bad.³ Averments of deraignment of title should not be made;⁴ but if a plaintiff undertakes to make such averments, every fact which he may be required to prove must be alleged.⁵ If a will constitutes a link in the chain, it must be averred that the same was admitted to probate.⁶ It is not necessary to state how the title or ownership is derived.⁷ A petition which states that plaintiff is the owner and entitled to the immediate possession is not defective for want of an averment that he owns the same in fee-simple.⁸ A present ownership in fee and a right to the immediate possession, together with a wrongful withholding of premises, constitute a good cause of action for the recovery of real property.⁹ Though an allegation that the defendant unlawfully keeps the plaintiff out of possession is essential, yet the absence of such an averment will not be fatal if no objection is made.¹⁰ It is not essential that the

cannot be maintained unless the plaintiff states in his petition that he has complied with the terms of the contract. *Zolter v. Lampson*, 2 Clev. Rep. 10.

¹ *Swayanie v. Vess*, 91 Ind. 584; *Dunn v. Remington*, 9 Neb. 82.

² *Castro v. Richardson*, 18 Cal. 478.

³ *Morgan v. Railway Co.*, 120 Ind. 101; *Reynolds v. Copeland*, 71 Ind. 422.

⁴ *Larco v. Casanueva*, 30 Cal. 560.

⁵ *Castro v. Richardson*, 18 Cal. 478.

⁶ *Id.*

⁷ *Kansas Pacific Ry. Co. v. MoBratney*, 12 Kan. 9.

⁸ *Scallon v. Winter*, 2 C. S. C. R. 156.

⁹ *Merrill v. Dearing*, 22 Minn. 376; *Walter v. Lockwood*, 23 Barb. 238; *Payne v. Tredwell*, 16 Cal. 223. A petition which states that plaintiff is the owner in fee of land of which

the defendant is in actual possession, and that a demand in writing has been made for the surrender thereof, is sufficient to warrant a recovery. *Wells v. Masterson*, 6 Minn. 566. It must be also stated that the plaintiff is entitled to possession. *McKinley v. Tuttle*, 42 Cal. 570. A plaintiff may recover upon his possession as between himself and a stranger who has dispossessed him. *Newnam v. Cincinnati*, 18 O. 323. And to warrant a recovery upon prior possession alone it must be actual and notorious. *Abram v. Will*, 6 O. 164. Prior possession being presumptive evidence of title, when uncontradicted is sufficient to recover as against a mere intruder. *Ludlow v. McBride*, 3 O. 241.

¹⁰ *Middletown v. Westenny*, 7 O. C. C. 393.

petition contain averments showing that plaintiff is within any of the exceptions of the statute of limitations, unless it appears from the facts alleged that the action is barred.¹

The property must be described with sufficient certainty to enable the officer to identify it.² The petition, however, may be amended where it does not contain a proper description.³ But where there is an omission in the description of a portion of the premises, the petition cannot thereafter be amended so as to include the omitted part when the statute of limitation has run as to that omitted.⁴ It is not necessary to allege demand unless the relation of landlord and tenant exists between the parties.⁵ If a right to recover is shown to have existed at the time of the commencement of the suit, but which terminates during the pendency of the action, the plaintiff may recover for withholding the property.⁶ Where a plaintiff parts with his title during the pendency of the action it may be continued in his name, unless the grantee applies to be substituted as plaintiff.⁷ An action for damages for withholding property and one for the recovery thereof may be joined in one action,⁸ as well as with one for rents and profits.⁹ To warrant a recovery of damages the same must be specially alleged in the petition.¹⁰

Sec. 1047. Petition for possession merely.—

Plaintiff states that he is the owner of and seized in fee-simple of the following described lands and tenements situate in the county of —, to wit: [*Description.*]

That the said plaintiff is entitled to the possession of said

¹ *Forest v. Jelke*, 7 O. C. C. 23.

² *R. S.*, sec. 5781, 5795; *Cunningham v. McCullum*, 98 Ind. 38; *Franco v. Allman*, 77 Ind. 417; *Dale v. Insurance Co.*, 89 Ind. 473; *Lewis v. Owne*, 64 Ind. 446; *Brown v. Anderson*, 90 Ind. 93.

³ *Russell v. Conn.*, 25 N. Y. 81; *Olen-dorf v. Cook*, 1 Lana. 37.

⁴ *Hills v. Ludwig*, 46 O. S. 373.

⁵ *McCaslin v. State*, 99 Ind. 423.

⁶ *O. Code*, sec. 5784.

⁷ *Camarillo v. Fenlon*, 49 Cal. 202.

⁸ *McKinney v. McKinney*, 8 O. S. 423. *Contra*, *Holmes v. Williams*, 16 Minn. 164.

⁹ *Lord v. Dearing*, 24 Minn. 110; *Van Devort v. Gould*, 26 N. Y. 639.

¹⁰ *McKinley v. Tuttle*, 42 Cal. 570. It has been held that a claim for damages for withholding possession does not include rents and profits during such time as the possession has been wrongfully withheld. That is a separate cause of action. *Larned v. Hudson*, 57 N. Y. 151. Ejectment is not the proper remedy for the recovery of a mere easement. *Child v. Chappell*, 9 N. Y. 246; *Strong v. Brooklyn*, 68 N. Y. 1; *Pinkum v. Eau Claire*, 81 Wis. 301.

premises, and that the said defendant unlawfully keeps him out of the possession thereof.

That said plaintiff therefore prays judgment against the said defendant for the recovery of possession of said premises and for the said sum of — dollars, his damages so as aforesaid sustained.

NOTE.—Adapted from *Bechtel v. Cook*, Supreme Court, unreported, No. 2044; Code, sec. 5781.

Sec. 1048. Petition for possession and rents.—

1. The plaintiff has a legal estate in, and is entitled to the immediate possession of, the following described real property, situate in the county of —, and state of Ohio, and bounded and described as follows, viz.: [*Description.*]

The defendant unlawfully keeps the plaintiff out of the possession of said premises.

2. The defendant, while unlawfully keeping plaintiff out of the possession as aforesaid, has, ever since the — day of —, 18—, excluded plaintiff from the rents, issues and profits of said premises, and refuses to account to plaintiff therefor, or pay to him any part of the value thereof. The value of the rents, issues and profits from said date, and the damages for withholding said premises from plaintiff, amount to \$—.

Wherefore plaintiff asks judgment for the delivery of said real property, and for said sum of \$—, and for all other proper relief.

NOTE.—From *Gard v. Moffitt*, Supreme Court, unreported, No. 1786. There are two causes of action and should be stated as in next section.

Sec. 1049. Petition for possession and damages.—

First cause of action: The said plaintiff complains of the said defendant for that the said plaintiff is now, and has been ever since the — day of —, 18—, seized of an estate for life in the following lands and tenements situate in the township of —, county of —, and state of Ohio, and known as being part of —, and is bounded as follows: [*Description.*]

That he is now, and has been during all the time hereinbefore mentioned, entitled to the possession thereof, and that the said defendant unlawfully keeps, and has unlawfully kept, him out of the possession of a certain portion thereof, to wit, — of an acre of the aforesaid described land, during all the time hereinbefore mentioned.

The said plaintiff therefore prays judgment against the said defendant for the recovery of the possession of said premises.

Second cause of action: Plaintiff says that he adopts and reiterates, the same as though herein rewritten, all the facts set forth and allegations contained in her foregoing first cause of action, and makes the same a part of this his second cause

of action, and further says that the said defendant has been in the possession of the said premises, receiving the rents, issues and profits thereof, from the — day of —, 18—, up to the time of the commencement of this action, and he avers that he has sustained damages, by the unlawful withholding of the possession of the said premises during all that time, in the sum of — dollars.

Wherefore he prays judgment against the said defendant for the recovery of the possession of the said premises, and also for the said sum of — dollars, his damages so as aforesaid sustained.

Sec. 1050. Action to recover possession of real estate — Defenses.— The code allows a defendant to enter a general denial as to the title alleged in the petition, or that he withholds the possession;¹ and under it he may prove any fact tending to show that the plaintiff has not the title or the right to possession;² or he may show an adverse occupancy of the premises by himself or his grantor for more than twenty-one years;³ or a paramount title;⁴ or that the action is barred by the statute of limitations;⁵ or it may be shown that the premises were purchased at an administrator's sale.⁶ In fact, a general denial will put in issue all allegations of title and allow the defendant to prove any facts which tend to show that there is no title in the plaintiff.⁷ He may, however, if he prefers, set out fully and specifically the facts constituting his defense, in which event his answer must be governed by the ordinary rules of pleading.⁸ Where both parties derive title from the same source, neither is permitted to deny the

¹ O. Code, sec. 5782. *Wintermute v. Montgomery*, 11 O. S. 442-4.

² *Wicks v. Smith*, 18 Kan. 508.

³ *Forest v. Jelke*, 7 O. C. C. 23.

⁴ *Matkin v. Marx*, 96 Ala., 501; 11 S. Rep. 633.

⁵ *Kyser v. Cannon*, 29 O. S. 359; 11 O. S. 444; 35 O. S. 387. If specially pleaded no reply is necessary, 29 O. S. 359. Pleading statute of limitation is equivalent merely to a denial of title. *Id.*; *Rhodes v. Gunn*, 35 O. S. 387; *Powers v. Armstrong*, 36 O. S. 360.

⁶ *Macey v. Stark*, 21 S. W. Rep. 1088 (Mo., 1893).

⁷ *Northern Pac. R. R. Co. v. McCormick*, 55 Fed. Rep. 601. Anything

may be shown which rebuts the right of the plaintiff to the possession. *Smith v. Hobbs*, 49 Kan. 800; 31 Pac. Rep. 687. Under a denial of the title of the plaintiff, possession by the defendant shall be taken as admitted. O. Code, sec. 5782. The defendant cannot, after plaintiff has established his legal title, show an equity in himself under a parol contract. *Stewart v. Hoag*, 12 O. S. 623. An answer denying that plaintiff has any legal estate in or is entitled to the possession of the premises is simply a denial of legal title. *Rothe v. Railroad Co.*, 37 O. S. 147.

⁸ *Wicks v. Smith*, 18 Kan. 508.

title of the other.¹ The burden of proving title being upon plaintiff, he must recover, if at all, upon the strength of his own title and not by reason of any weakness in that of his adversary.² Several defendants may unite and defend jointly,³ and if one does not defend for the whole premises his answer should describe the particular part for which the defense is made.⁴ The action being a substitute for the common-law action of ejectment, a defendant may set up as many defenses as he may have, whether they be what has heretofore been denominated legal or equitable, or both may be joined.⁵

The decision just referred to in the note is contrary to the code, the decisions and the universal practice thereunder; as a defense based upon an equitable title, and right of possession thereunder, may, when specially pleaded, be shown, but cannot be shown under a general denial,⁶ and an equitable defense may be interposed the same as in an action at law.⁷ The rule could not justly be otherwise since legal and equitable actions have been united. A defendant may elect to rely on an equitable title or upon a counter-claim, or may maintain an action thereon.⁸ Where the equitable defense is such that it may, if true, defeat the action, trial should be had first upon it.⁹ But a holder of a legal title cannot set up a countervailing equity in a third person with whom he is not in privity, or who, being a party, confesses the equitable title.¹⁰ And a vendee, under a contract of sale brought by his vendor, may assert the same equitable rights as he could if a party to an action for specific performance.¹¹ But equitable title without possession cannot be set up as a defense.¹² A defendant may also

¹ *Dolph v. Barney*, 5 Oreg. 192.

² *Blackman v. Riley*, 188 N. Y. 318-325.

³ *Humphries v. Huffman*, 33 O. S. 395.

⁴ O. Code, sec. 5782.

⁵ O. Code, sec. 5782. Under this provision the United States circuit court has made the broad statement that only such defenses as were available at law could be made to this action, and that equitable defenses are out of place, and especially that an

equitable estoppel could not be urged, and that fraud and mistake have no place here. *Young v. Board*, 51 Fed. Rep. 585. See *ante*, sec. 1046.

⁶ *Powers v. Armstrong*, 36 O. S. 357.

⁷ *Murray v. Walker*, 81 N. Y. 399.

⁸ *Witte v. Lockwood*, 39 O. S. 141.

⁹ *Dodsworth v. Hoppel*, 33 O. S. 16.

¹⁰ *McKinzie v. Penell*, 15 O. S. 162.

¹¹ *Cavalli v. Allen*, 57 N. Y. 508.

¹² *Spencer v. Marckel*, 2 O. 263 (1826).

avail himself of any fraud committed against him as a defense.¹ The possession necessary to bar an action need not be continuous for the period of limitation in any one occupier;² and an answer disclaiming possession other than as a tenant of a third party whose title is given is no defense unless the title be perfect.³ Nor is the fact that the plaintiff takes possession after suit commenced a good defense;⁴ nor can a tenant controvert the title of his landlord except to show that it expired after the execution of the lease under which the tenant entered;⁵ nor can the fact that a mortgage was given for an illegal consideration be urged as a defense;⁶ nor can the action be sustained against a railroad company to recover land on which the road is located and operated after public rights have intervened;⁷ nor can a defendant impeach the validity of a lease which he has purchased as against the heirs of the original lessee;⁸ nor will descent cast upon parties in possession after the action be a bar.⁹

A defendant may, by a supplementary answer, set up title acquired *pendente lite*, or other matters of defense arising subsequent to the commencement of the suit.¹⁰ A person who has acquired the possession of property honestly under a color of title may show an outstanding title in a stranger, even though the naked title be in another, unless the plaintiff is entitled to the possession.¹¹ A recital in a deed by one tenant in common to a stranger cannot affect any right of another tenant who sues for the recovery of the entire estate.¹² And where a person is permitted to defend in place of the defend-

¹ Peterson v. Brown, 17 Nev. 172; 30 Pac. Rep. 697 (1882); Franklin v. Kelly, 2 Neb. 79. As well as of the act relating to occupying claimants of land. R. S., sec. 5785. See *post*, sec. 1055. A defendant who claims protection as a *bona fide* purchaser without notice must deny notice, even though not alleged in the petition. Daily v. Kingsley, 35 Neb. 835.

² McNeely v. Langan, 22 O. S. 32.

³ Harkness v. Corning, 24 O. S. 416.

⁴ McChesney v. Wainright, 5 O. 452.

⁵ Devacht v. Newsam, 3 O. 59.

⁶ Williams v. Englebrecht, 37 O. S. 383 (1881).

⁷ Morgan v. Railway Co., 30 Ind. 101; Kincaid v. Indiana, etc., 124 Ind. 577, 582; Louisville, etc. R. R. Co. v. Beck, 119 Ind. 124.

⁸ Hart v. Johnson, 6 O. 83.

⁹ Holt v. Hemphill, 3 O. 232.

¹⁰ Moss v. Shear, 30 Cal. 467. See Dawson v. Porter, 2 O. 305.

¹¹ Fowler v. Whitman, 2 O. S. 270.

See Perkins v. Dibble, 10 O. 433.

¹² Thomason v. Dayton, 40 O. S. 63.

ant in possession, he cannot set up any defense which the tenant himself could not make.¹

Sec. 1051. Answer denying ownership, possession, etc., claiming adverse possession for twenty-one years.—

And now comes the said defendant, L. O., and for answer to the plaintiff's petition says:

1. He denies that the plaintiff is seized in fee-simple of the lands in said petition described. Denies that the plaintiff is entitled to the possession of the same. Denies that he is entitled to or has sustained damage by reason of any act of the defendant, in the sum of — dollars or any other sum of money. And denies that the premises described in said petition are a part of or belonging to the east half of the north-east quarter of section four, in township number three south, range twelve east, in the county of —, Ohio.

2. And the said defendant, further answering, says that the said plaintiff ought not to have his said action against him; because he says that the said defendant and those under whom he claims said premises have for more than twenty-one years next before and preceding the bringing of this action continuously held and kept said premises in possession adversely to the right of the plaintiff and all other persons, and this he is ready to make appear.

Sec. 1052. Answer of bona fide purchaser without notice.

On the — day of —, 18—, one C. D. was in possession of the following-described real estate, to wit: [*describe it*], being the property set forth in said petition, and claimed by the plaintiff.

That the defendant, believing said C. D. to be the owner thereof, on said day purchased said real estate from him for the sum of \$—, and received from him a deed of that date, duly executed and acknowledged, which deed contained a covenant that he was seized in fee of said premises, and that they were free from inumbrances.

That on the — day of —, 18—, the defendant actually paid said C. D. the sum of \$— for said land, having no notice whatever at the time of receiving said deed or of the payment of said purchase-money of any claim, right, title or interest of the plaintiff or of any other person in said real estate except C. D.

Sec. 1053. Another form of denial.—

P. W. for his answer herein says:

1. He denies that plaintiff has a legal estate in, is the owner in fee-simple or is entitled to the possession of the lands and tenements in the petition described, and denies that

¹ Whissenhunt v. Jones, 80 N. C. 348.

he is entitled to the rents, issues and profits from the same from said — day of —, 18—, or from any other date.

2. For a second defense this defendant says that the cause of action in the petition set forth did not accrue within twenty-one years next before this action was begun.

G. A. and J. R., Attorneys.

Sec. 1054. Answer and cross-petition for recovery of possession.—

And now comes the defendant L. D. G., and for answer and cross-petition in this action says that he has a legal estate in and is the owner in fee-simple of one undivided fifth part of all that part of the west half of in-lot number forty-six in the city of N., county of L., and state of Ohio, which is in the plaintiff's petition described, and is entitled to the immediate possession thereof.

Wherefore he prays judgment for the possession of said real estate, and that his said one-fifth part thereof may be set off to him in severalty, and for all proper relief.

Sec. 1055. Occupying claimants — When allowed for improvements.—When one is in possession of land by plain and connected title in law or equity, or by deed, devise, descent, contract, bond, agreement, from another claiming title, or by deed under a sale on execution, or under a tax sale, or sale made by executors, administrators or guardians, or other persons in pursuance of an order of court or decree in chancery, and has obtained title and is in possession without fraud or collusion, he cannot be evicted by an action for the recovery of realty under the code by a person setting up adverse or better title, until, previous to being notified of the commencement of the suit on the adverse claim, he is paid the full value of permanent improvements made by him, or unless he refuses upon demand to pay to the person claiming the adverse title the value of the land without improvement.¹ A person may claim the benefit of this act only when in possession, and

¹ R. S., sec. 5786. Nor can a court render judgment against an occupying claimant in any such action. The question of the compensation to be allowed and paid to him must be tried to a jury in the manner prescribed. R. S., secs. 5788-94. The successful claimant may elect to receive the value of the land without improvements, in which event he must tender a general warranty deed. R. S., sec. 5788. When occupant may have action for title. See R. S., sec. 5796. An occupant must have obtained both the title and possession without fraud. *Robinson v. Ward*, 5 W. L. B. 465 (1848, Sup.).

when he has been evicted by a title both paramount and adverse. Thus, one in possession under a contract of purchase, evicted by a trustee holding a legal title, is not in possession under an adverse title, nor entitled to compensation for improvements. But the fact that he has no valid defense to an action for the recovery of the premises does not preclude him from being awarded compensation for improvements in equity.¹ Nor is a tenant for life who obtained title and possession with knowledge of the quantity of his estate entitled to a benefit of the statute against a reversioner or remainderman.² A purchaser from a judgment debtor of land actually levied in execution is not entitled to the benefit of the act.³ Nor are township trustees as to leases of school lands,⁴ or a mortgagee, entitled to the benefit of the act.⁵ But a purchaser under an execution or administration sale is entitled to the benefit of the act.⁶ Where lands which have been fraudulently transferred by means of a judicial sale have descended to an heir who has made valuable improvements thereon in good faith, he is entitled, in an action by a judgment creditor to set the same aside, to set up his claim for compensation for the improvements, in case the transfer be declared fraudulent.⁷ In an application for relief under this act, the mere fact of notice of the claim which is successfully asserted is not conclusive of the fraud and collusion on the part of the purchaser. He may show that notwithstanding such notice he purchased in good faith and made the improvements in the belief that it was his own land.⁸

Sec. 1056. Pleading by occupying claimant.—

[*Caption of original cause.*]

The defendant for a complaint herein, as occupying claimant, says: That he purchased the bonds described in the plaintiff's petition, and for which said plaintiff has obtained a judgment herein against him for the possession thereof, of one

¹ Preston v. Brown, 35 O. S. 18 (1878).

⁵ Taylor v. Foster, 23 O. S. 255.

² Beardsley v. Chapman, 1 O. S. 118.

⁶ Sellers v. Corwin, 5 O. 398-9; Longworth v. Wolfington, 6 O. 9 (1833).

³ Vincent v. Goddard, 7 O. (Pt. 2), 183. See Avery v. Wowyer, 3 Clev. Rep. 201; s. c., 4 W. L. N. 441.

⁷ Bomberger v. Turner, 13 O. S. 263 (1862).

⁸ Harrison v. Castner, 11 O. S. 339.

⁴ Hart v. Johnson, 6 O. 38.

E. F., who executed to him a warranty deed therefor on the — day of —, 18—.

That said E. F., at the time this defendant purchased the said premises, and when he executed the deed aforesaid, claimed to be the owner in fee-simple thereof by virtue of a warranty deed executed by one G. H., who at the time of the execution of said last-mentioned deed claimed to be the owner in fee-simple of said premises.

That this defendant, believing he was acquiring a good title in fee-simple thereof from the said E. F., took possession of said premises and in good faith made valuable and lasting improvements thereon before the commencement of said action in ejectment, to wit: one frame barn.

That the value of said real estate, aside from said improvements, is — dollars; and the value of said improvements, at the time said judgment in ejectment was rendered, was — dollars.

That this defendant, while so in possession of said premises, has paid — dollars for taxes due thereon.

Wherefore he prays judgment for the value of said improvements and taxes.

NOTE.— This may be filed as an answer in an action for the recovery of possession, or by an independent action.

Sec. 1057. Petition to complete contract.— When one of two persons to a contract to convey land dies before the conveyance is made, the survivor may, by petition against the purchaser and the heirs of the deceased, ask to be authorized to complete the same.¹ And the personal representative of a decedent who has entered into a contract for the sale of realty may also file a petition for the completion of such contract.² The petitioner in such case must set forth the names of all the contracting parties, giving a description of the lands, stating the time the contract was made, and that it has been performed on his part. He is also required to annex a copy of the contract to his petition.³

Sec. 1058. Petition to sell entailed and other estates.— Authority is given by statute to courts of common pleas to order the sale of an estate held by a tenant entailed for life, or by the grantee or devisee of a qualified or conditional fee, or of any other qualified, conditional or determinable interest, or by a person claiming under such tenant, grantee or devisee, or by the trustees or beneficiaries, when satisfied that a sale

¹ O. Code, sec. 5797.

² O. Code, sec. 5798.

³ O. Code, sec. 5800.

will be for the benefit of such persons.¹ This is not applicable to an estate in dower. A petition in such a case must describe the estate to be sold, giving a clear statement of the interest of the plaintiff, as well as a copy of the will, deed or other instrument of writing by which the estate is created, although an omission to annex a copy will not be fatal.² All persons interested in the estate, who may by the terms of the will, deed or other instrument creating the estate thereafter become interested therein as heirs, reversioners or otherwise, shall be made parties to the petition.³

Sec. 1059. Petition for sale of real estate under a transcript judgment from justice.—

The plaintiff says that on the — day of —, 18—, before J. F. M., a justice of the peace in and for the township of —, county of — and state of Ohio aforesaid, he recovered a judgment against the defendant, J. W. O., for the sum of \$— debt and \$— costs of suit, upon which judgment costs of increase have accrued in the sum of \$—.

That afterward, to wit, on the — day of —, 18—, said judgment remaining in full force, unreversed and wholly unsatisfied, he caused an execution to issue upon said judgment, which was returned unsatisfied.

That afterwards, to wit, on the — day of —, 18—, said judgment remaining in full force, unreversed and wholly unsatisfied, he caused an execution to issue upon said judgment, which was returned with the following indorsement thereon:

“— —, 18—. Execution returned indorsed: Received this writ — —, 18—, and no goods and chattels found whereon to levy, the same is hereby returned this — day of —, 18—.

W. E. O., Constable.”

That afterwards, to wit, on the — day of —, 18—, said judgment still remaining in full force and wholly unsatisfied, he caused a transcript of said judgment to be filed in the office of the clerk of the court of — county, Ohio, and on the — day of —, 18—, he caused an execution to be issued upon said judgment to the sheriff of — county, Ohio, which was levied upon the following real estate belonging to the said defendant, situate, etc., as shown by the return of said sheriff, as follows:

“Received this writ — —, 18—, at 4 P. M. No goods; and by virtue of the command thereof, and by order of plaintiff's attorneys, I did, on the — day of —, 18—, levy on

¹ O. Code, sec. 5808.

² Oyer v. Scanlon, 83 O. S. 808.

³ O. Code, sec. 5804. As to pro-

ceedings under this action, see R. S.

secs. 5805-5813.

the following described real estate of defendant situate in the county of — and state of Ohio, to wit: [*Description.*]

"Thereupon this writ is returned by order of plaintiff's attorneys.
F. L. B., Sheriff."

That said judgment became a lien upon the real estate above described from the — day of —, 18—, the date of the filing of said transcript.

That said judgment remains in full force and wholly unsatisfied; that there is due him thereon from the defendant, J. W. C., the sum of \$—, and also the further sum of \$—, costs of increase; that said sum bears interest from the — day of —, 18—, at — per cent.

Plaintiff says that the defendants, A. L. C., C. F. S. and S. S., claim some interest in and to said premises.

Wherefore plaintiff prays that said defendants, A. L. C., C. F. S. and S. S., may be required to set forth what claim, if any, they may have in and to said premises; that the same may be declared subsequent to that of this plaintiff; that said premises may be sold, and out of the proceeds this plaintiff may be paid the amount of his said judgment, together with interest and costs and all proper relief.

M. & W., Attorneys for Plaintiff.

NOTE.—Changed somewhat from *Clark v. Lindsey*, 47 O. S. 487. The interest which a judgment may bind must be one which can be levied upon and sold to satisfy it. *Roads v. Symmes*, 1 O. 314. A mere equitable interest in land, the judgment debtor not being in possession, cannot be sold on execution. 1 O. 281; 6 O. 156; 7 O. 227; 8 O. 24; 16 O. 469. See *Clark v. Lindsey*, *supra*, where it was intimated that there might have been some objection to the above petition on account of it asking for the sale of an interest in realty of an equitable nature; but held that an objection to the form of the action could not be available in error proceedings. The form has been changed so as to cover the legal interest.

Sec. 1060. Petition against city for recovery of value of real estate unlawfully appropriated without making compensation.—

J. L., O. L. A. and J. L. S., the plaintiffs above named, say that they are, and were prior to the grievances hereinafter mentioned, the legal owners in fee-simple of the following described land in the city of C. and state of Ohio, viz.: [*Description.*]

That said defendant, the city of C., in constructing a public street from said M. pike to G. avenue in said city, has taken possession of all of said property, and constructed said street thereon without ever having appropriated the same by law, or having made any compensation therefor in money or otherwise, and is now in possession of all of said land, and wholly refuses to surrender the possession thereof to these plaintiffs, or to make any compensation to them therefor.

On the discovery by plaintiffs of the unauthorized and un-

lawful appropriation by defendant of the above described premises in the manner and for the purposes aforesaid, plaintiffs offered to convey the same to defendant by deed in fee-simple upon the payment by defendant of the value of the same, which defendant refused to pay.

Plaintiffs now offer to convey said premises in fee-simple to defendant upon the payment by defendant of the value of the same, and they agree that upon the value of said premises being fixed in this case, and the payment of the same, the decree of this court may be entered ordering a conveyance in fee-simple of said premises to defendant, and plaintiffs here tender said conveyance and surrender of title to said premises upon payment as aforesaid.

That said land is justly worth the sum of — dollars.

Wherefore said plaintiffs pray that said defendant be decreed to make compensation to them in money for the value of said land so unlawfully taken and appropriated as aforesaid, and that they recover judgment against defendant for the sum of — dollars, with interest and costs, and for such other and further relief as under the circumstances of the case they may be entitled to.

McD. & L.,
Plaintiffs' Attorneys.

NOTE.—From *Longworth v. Cincinnati*, 47 O. S. 637, in which a demurrer thereto was overruled. This remedy would avoid disturbance of the public convenience where improvements have been made on the street. *Id.*

CHAPTER 75.

RECEIVERS.

Sec. 1061. When receiver may be appointed.	Sec. 1068. What assets are administered by receiver.
1062. Vacating appointment, and review of same.	1069. Actions by receiver.
1063. Conflict in appointment of receiver.	1070. Allegation of appointment in action by receiver.
1064. Receiver of corporation.	1071. Actions against receiver.
1065. Petition against corporation on a judgment, and for receiver.	1072. Averment of appointment in suit against receiver.
1066. Petition for an accounting and to set aside a fraudulent judgment, and for a receiver.	1073. Foreign receivers.
1067. Petition by partner for receiver of partnership property.	1074. Application of receiver for leave to sell property.
	1075. Application of receiver for authority to pay claims.
	1076. Petition to be allowed to account and be discharged.
	1077. Formal parts of account.

Sec. 1061. When receiver may be appointed.— It is too well settled to warrant the citation of authority that the appointment of a receiver is merely an auxiliary or provisional remedy. There must first be a legal or equitable cause of action actually filed in court in which some ground is stated why a receiver should be appointed.¹ Still, courts are importuned with applications for the appointment of receivers when the only real object is the receivership. The petitioner should bear in mind that the petition must set forth the requisites of a cause of action, otherwise an appointment cannot be made. Indeed the appointment of a receiver is largely within the discretion of the court; it must be satisfied that the appointment of a receiver in any of the actions in which the appointment is allowed to be made is necessary to the preservation of the property or fund in controversy, and to protect the rights of the parties.² The code provides when the appoint-

¹ *Railroad Co. v. Duckworth*, 2 O. C. C. 518; *aff'd*, 81 W. L. B. 36.

² *State v. Bank*, 56 N. W. Rep. 575 (Minn., 1898); R. S., sec. 5587; *Wat-*

ment of a receiver may be made, but allows the appointment in all other cases not specially provided for, that is, where receivers have heretofore been appointed by the usages of equity; ¹ the equitable rules which govern the manner of appointment and removal in equity being applicable to cases under the code, when not otherwise provided. ² A receiver may be appointed in an action by a vendor to set aside a fraudulent transfer; or by a creditor to subject any property to his claim. ³ Still, any creditor having a valid claim may ask for the appointment of a receiver; ⁴ or in actions between partners, or on the application of any party whose right to or interest in property is probable, ⁵ which will include a suit brought by a surety to compel the principal to pay the indebtedness; ⁶ or, in actions to foreclose a mortgage, when the property is in danger of being lost or destroyed, or is probably insufficient to discharge the debt. An appointment may also be made after judgment to carry it into effect, by disposing or preserving the property. ⁷ It may also be made in a proceeding in aid of execution where there are conflicting claims. ⁸ The appointment will not oust other courts of their ordinary jurisdiction as to matters in which the receiver may be interested or which affect the property in his hands. It may or may not assume jurisdiction over all such controversies. ⁹

Sec. 1062. Vacating appointment, and review of same.— When interested parties claim that an appointment of a receiver has been wrongfully made, they should file a motion with the court making the appointment for its vacation, as the power to vacate is implied in the power to appoint. ¹⁰ The

kings v. Bank, 51 Kan. 254. As to when receiver will not be appointed at suit of stockholder, see *Straman v. Water-works Co.*, 8 O. C. C. 89.

¹ O. Code, sec. 5587. The usages of courts of equity are applicable to cases arising under the code, when not otherwise provided. *Doane v. Donogh*, 1 Toledo Legal News, 287 (Cin. Super. Ct., 1894).

² *Railroad Co. v. Sloan*, 81 O. S. 1.

³ O. Code, sec. 5587.

⁴ *Bank v. Minge*, 49 Minn. 454. But a creditor whose remedy at law has

not been exhausted cannot ask the appointment. *Hinkley v. Pfister*, 83 Wis. 65; 33 N. W. Rep. 210.

⁵ O. Code, sec. 5587.

⁶ *Barber v. Bank*, 45 O. S. 183.

⁷ O. Code, sec. 5587.

⁸ *Edgerton v. Hanna*, 11 O. S. 323.

⁹ *Railroad Co. v. Smith*, 19 Kan. 225; *Kennedy v. Railroad Co.*, 5 W. L. B. 533.

¹⁰ *Railroad Co. v. Sloan*, 81 O. S. 1.

The appointment is not vacated by an appeal. *Swing v. Townsend*, 24 O. S. 1.

hearing upon such a motion should be based upon affidavits, and an order refusing to grant the same may be reviewed on error.¹ A bill of exceptions, in which are included the affidavits and the order of the court, should be filed with the petition in error.²

Sec. 1063. Conflict in appointment of receiver.—Conflict may arise over the appointment of a receiver by different courts or judges, especially where there are contesting factions in corporations. Where two receivers are appointed upon the same day by different courts or judges, the question as to which is the legal one must be determined by the priority of judicial action. It is immaterial which one first perfects his appointment or takes possession of the property, as the question is governed solely by the order of appointment first pronounced by the court, the fractions of a day being taken into consideration.³ It is an elementary principle that a judgment or order takes effect from the time of its pronouncement by the court, which is the judicial act, and that the entry thereof is purely ministerial.⁴ The title to the property, therefore, vests in the court through its officer, the receiver, the moment the order is made or pronounced, and when the appointment is perfected it dates back to the order.⁵ It follows, therefore, that a receiver appointed by another court, or even by another judge of the same court, as in the leading case upon this subject, after one receiver has been appointed, even though he perfects his appointment before the first appointee, is not the legal receiver.⁶ A receiver subsequently appointed wlo

¹ *Railroad Co. v. Sloan*, 81 O. S. 1; *Mercantile Trust Co. v. Iron Works*, 4 O. C. C. 579.

² In *Countee v. Armstrong*, 8 W. L. B. 286, where the appointment of a receiver was reviewed on error, there was nothing filed in the reviewing court except the original pleadings.

³ *People v. Central City Bank*, 53 Barb. 412; *Beach on Receivers*, sec. 200.

⁴ *Freeman on Judgments*, sec. 38, and cases cited; *State ex rel. v. Meacham*, 6 O. C. C. 81-34.

⁵ *Storm v. Waddell*, 2 Sandf. Ch. 494; *Deming v. Marble Co.*, 12 Abb. Pr. 66; *Beach on Receivers*, secs. 200, 201; *Wilson v. Allen*, 6 Barb. 542. It is not deferred until the bond is given in compliance with the order. *Maynard v. Bond*, 67 Mo. 815. See, also, *In re Berry*, 26 Barb. 55.

⁶ *People v. Bank*, 53 Barb. 412; *Spinning v. Ohio Life Ins. Co.*, 2 Disn. 368; *Beach on Receivers*, sec. 248. See, as to when receivers may be appointed, *Gaines v. Trust Co.*, 20 N. Y. S. 1028; *St. Louis Car Co. v. Stillwater Street Railway Co.*, 54 N.

interferes in any manner with the one first appointed, even by the prosecution of another suit or otherwise, will be guilty of contempt; and this will extend to counsel taking part in such proceeding.¹ This is so even though the property has not been reduced to possession,² or the formal order of appointment has not been drawn or entered.³ It is essential, however, that there should be actual knowledge of the appointment.⁴

Sec. 1064. Receiver of corporation.—A receiver may be appointed for a corporation in any of the actions stated in a preceding section,⁵ or in any of the cases where receivers have heretofore been appointed by the usages of equity,⁶ or when a corporation has been dissolved.⁷ A stockholder cannot ask a court of equity to wind up the affairs of a corporation, or to take the management from the directors, even on the ground of mismanagement or fraud. His remedy is by injunction against the unlawful conduct of the directors, in which case the court may appoint a receiver.⁸ The insolvency of a corporation is a jurisdictional fact, and the court can neither grant an injunction nor appoint a receiver unless it is made to appear;⁹ nor will an appointment be made upon mere allegations of insolvency not accompanied by any charge of fraud, mismanagement or wasting of assets, which should be sup-

W. Rep. 1064 (Minn., 1893). An order of another court appointing a receiver of the same property is subject to the right of the court making the first appointment. *Mahoney v. Belmont*, 63 N. Y. 183.

¹ *Spinning v. Insurance Co.*, 2 Disn. 368-70; *Beach on Receivers*, sec. 238; *High on Receivers*, sec. 51; *Richards v. People*, 81 Ill. 551.

² *High on Receivers*, sec. 164.

³ *Maynard v. Bond*, *supra*; *In re Berry*, *supra*; *Allen v. State*, 61 Ga. 166; *High on Receivers*, sec. 166.

⁴ *Allen v. State*, *supra*; *High on Receivers*, sec. 166; *Lewis v. Singleton*, 61 Ga. 164. It is sufficient if a person present when the appointment is made told the parties. *Hull v. Heed*, 3 Edwards' Ch. 236.

⁵ *Ante*, sec. 1061.

⁶ O. Code, sec. 5587.

⁷ See *ante*, sec. 1011. One or more receivers may be appointed for the estate and effects. R. S., sec. 5656. Who may be appointed, R. S., sec. 5657; or ineligible, R. S., sec. 5588; powers, R. S., sec. 5658.

⁸ *Railroad Co. v. Duckworth*, 2 O. C. C. 518; *Mason v. Equitable League*, 27 Atl. Rep. 171 (Md., 1893); *Waterburg v. Express Co.*, 50 Barb. 166; *Railroad Co. v. Cannon*, 72 Md. 498; 20 Atl. Rep. 128. The affairs of a corporation can only be closed by the statutory dissolution.

⁹ *Atlantic Trust Co. v. Storage Co.*, 49 N. J. Eq. 402; 23 Atl. Rep. 934.

ported by affidavits.¹ And the specific acts constituting the fraud or mismanagement should be stated.² It is the duty of a receiver of a corporation which has been dissolved to collect all unpaid subscriptions due from stockholders.³ It has been stated that stockholders holding one-fifth of the stock of the corporation may petition for a dissolution of the corporation and have a receiver appointed to wind up its affairs;⁴ but the court has no authority to appoint a receiver until the order dissolving the corporation has been made.⁵ A petition for the dissolution of a corporation and for the appointment of a receiver must aver that the corporation is insolvent or in imminent danger of insolvency, or some other valid reason why the appointment should be made.⁶

Sec. 1065. Petition against corporation on a judgment, and for receiver.—

[Caption.]

[*Averment of corporate capacity as in post, sec. 1072.*]

On the — day of —, 18—, this plaintiff recovered a judgment against the said defendant in the — court of this state for the sum of — dollars and — cents.

That an execution against the said defendant was duly issued on said judgment to the sheriff of the county of — on the — day of —, 18—, and that said execution has been returned wholly unsatisfied.

That the said judgment and the claim therefor remain wholly unpaid.

That the said defendant is insolvent, or is in imminent danger of insolvency, and owes a large amount of indebtedness and claims, which it is unable to pay.

Wherefore plaintiff prays that the property of the said defendant corporation be sequestered and distributed; that the amount of plaintiff's judgment be paid therefrom; that the proceeds thereof be justly and fairly distributed among the fair and honest creditors of the defendant, including the plaintiff, in the order and in the proportions prescribed by law; that a receiver of the property and effects of the said defendant cor-

¹ Lawrence Iron Works Co. v. Rock Bridge Co., 47 Fed. Rep. 755. This is a wholesome decision for state courts to follow. An appointment of a receiver should seldom be made without a proper showing by affidavits.

² Robinson v. Land & Canal Co., 29 Pac. Rep. 750 (Colo., 1892).

³ R. S., sec. 5659.

⁴ See ante, sec. 1011; R. S., sec. 5673; Harancourt Brewing Co. v. Armstrong, 6 O. C. C. 468.

⁵ Bacon, etc. Co. v. Stove Co., 5 O. C. C. 289.

⁶ Mercantile Trust Co. v. Iron Works, 4 O. C. C. 579.

poration may be appointed, pursuant to law, with the usual powers and authority conferred upon receivers in such cases; and that the plaintiff have such other and further relief in the premises as may be just.

NOTE—R. S., sec. 5587. See form in *Barbour v. Bank*, 45 O. S. 183.

Sec. 1066. Petition for an accounting and to set aside a fraudulent judgment, and for a receiver.—

[*Caption.*]

[*Set forth plaintiff's claim, as in ante, sec. 1065.*]

That the defendants R. D., A. and K. are directors of said corporation, and on the — day of —, 18—, suffered judgment to be recovered against said corporation for the sum of \$— in favor of P., who was at that time its president.

The said corporation was not indebted to said P. in any sum whatever, but that said judgment was obtained without any consideration, and for the sole purpose of fraudulently covering up the property of said corporation.

That said corporation is insolvent, and entirely unable to pay its debts, and has no other property than that levied upon under the aforesaid execution.

That there is now due from the defendant to the plaintiff on his judgment the sum of \$—, with interest from the — day of —, 18—.

Plaintiff therefore prays and asks that said directors be required to account for the funds and property of said corporation committed to their charge, and for all corporate property acquired by themselves or lost by a violation or neglect of their duty as directors, and that they be required to pay all sums of money found due from them; that a receiver may be appointed to take charge of the property and effects of said corporation, and that said defendants may be enjoined from transferring any of the property or effects of said corporation until the further order of this court, and that upon the final hearing said judgment to said P. may be set aside, and said property sold, and the proceeds thereof applied to the payment of plaintiff's judgment, and for such other relief as justice and equity may require.

Sec. 1067. Petition by partner for receiver of partnership property.—

[*Caption.*]

That the plaintiff and defendant, on or about the — day of —, 18—, entered into a contract of partnership under the name of A. B. & Co. for the purpose of purchasing and selling goods, wares and merchandise, and of maintaining, for the purpose of such purchasing and selling, a large retail dry goods store in the city of —.

That in pursuance of said contract they purchased a stock of goods, wares and merchandise of many thousand dollars in value, established and opened a retail store in said city, and have maintained the same ever since.

That this plaintiff and defendant do not longer desire to maintain said copartnership and have dissolved the same, but are unable to agree upon a division of the stock of goods, wares and merchandise now on hand.

[*Or.* That the said defendant, not regarding his duties as a member of said partnership, has converted to his own personal use and benefit a large sum of the partnership accounts, to wit, — dollars, and has refused and still refuses to account for the same, although the plaintiff has so requested him to do.]

Wherefore plaintiff prays that a receiver be appointed to take charge of and sell said stock of goods, wares and merchandise [and for a decree dissolving said partnership].

Sec. 1068. What assets are administered by receiver.—

Generally everything which creditors may reach are assets in the hands of a receiver. In the case of corporations there are things which are assets in the hands of receivers although not as to the corporation; as, for instance, property fraudulently conveyed by the corporation, capital withdrawn with no provision for the payment of corporate debts, and the personal liability of stockholders for unpaid stock subscriptions.¹ That the statutory liability of stockholders cannot be considered assets in the hands of a receiver is plain. The tangible property is the primary source for the payment of the debts and the stockholders' liability only secondary. The corporate authorities themselves cannot have any control over it, and it must necessarily follow that they cannot transfer any right thereto to a receiver or trustee. Indeed the liability cannot become fixed until it has been shown in some way that the corporation is wholly insolvent and that its assets are not adequate for the payment of its debts.² A question may arise

¹ *Manufacturing Co. v. Langdon*, 44 Minn. 37; 46 N. W. Rep. 310; *St. Louis Car Co. v. Stillwater Street Ry. Co.*, 54 N. W. Rep. 1064 (Minn., 1898). to the corporate assets. *Jacobson v. Allen*, 12 Fed. Rep. 454. *Cf. Weeks v. Love*, 50 N. Y. 571.

² *Wright v. McCormack*, 17 O. S. 86; *Billings v. Robinson*, 94 N. Y. 415; *Minn. Thresher Co. v. Langdon*, 46 N. W. Rep. 310; *Cutting v. Damerel*, 88 N. Y. 410; *Arenz v. Weir*, 89 Ill. 25. The liability of stockholders

which does not seem to be definitely adjudicated, at least to the satisfaction of practitioners, whether or not a judgment can be taken against a corporation while in the hands of a receiver, and, after execution awarded and returned unsatisfied, the statutory liability enforced. It is well settled that the statutory liability cannot be resorted to until all remedies against the corporation have first been exhausted, and there can be no liability if the assets, including unpaid stock subscriptions, will pay the debts.¹ It would therefore seem that a suit should not be allowed to proceed until it has been ascertained definitely and positively how far the primary source of funds will go towards the liquidation of the indebtedness. This appears to be the only safe course under a statute requiring the court to find and determine the amount due by each stockholder liable on all of the indebtedness.² It would complicate affairs to allow the action to proceed before the assignee or receiver has found out the extent of the assets and liabilities. If the action is to be sustained at all, the petition should certainly set forth the fact that the affairs of the corporation are in process of settlement, giving the amount of assets and liabilities, so that if possible it can be determined to what extent the liability should be enforced.³ Where the order appointing a receiver confers upon him all functions of re-

to creditors may be regarded as a collateral statutory obligation for the benefit of creditors, and that the former are sureties to the latter. *Jacobson v. Allen*, 12 Fed. Rep. 454; *Hicks v. Burns*, 88 N. H. 145. The liability can only be enforced at the suit of a creditor. *Barber v. Sewing Machine Co.*, 7 O. C. C. 414; *White v. Ingersoll*, 2 Clev. Rep. 362.

¹ Cook on Stock & S., sec. 219, and cases cited.

² O. Code, sec. 8260.

³ See *Munger v. Jacobson*, 99 Ill. 349; Cook on S. & S., sec. 219, p. 281. In *Arenz v. Weir*, 89 Ill. 25, from the meagre report, it appears that the action was prosecuted against the stockholder after the receiver had

paid the amount realized from assets of the company.

A judgment was allowed to be taken against the corporation while in the hands of a receiver, after execution returned unsatisfied, and the statutory liability of stockholders enforced, in *Kincaid v. Dwinnelle*, 59 N. Y. 548. Under a statute making the directors liable for the debts for the violation of certain statutory provisions, it has been held that an action cannot be sustained against them, notwithstanding the corporation is in the hands of a receiver. *Patterson v. Manufacturing Co.*, 42 N. W. Rep. 926; 41 Minn. 84. *Mason v. Manufacturing Co.*, 27 Hun, 807, would seem by inference to hold that such an action may be sustained.

ceivers under the law, it becomes his duty to enforce the collection of any unpaid stock subscriptions, if necessary for the payment of debts.¹ A receiver may bring the action for the recovery of the unpaid stock subscription in his own name, though neither the statute nor the order in terms directs him to sue in that way.²

Sec. 1069. Actions by receiver.—As a general rule, a receiver cannot sue or be sued without leave of the court which appointed him.³ When appointed to rent certain premises and collect the rents, he has no power to prosecute an action in his own name against a tenant without authority from the court.⁴ He must allege his representative capacity with particularity, showing his appointment properly made in all respects, and that he has been specially authorized to prosecute the action in his representative capacity.⁵ Where the title of a receiver is not sufficiently stated in an action by him, objection thereto should be taken by motion to make definite and certain.⁶ A receiver of a railroad company is a competent party to restrain proceedings against the company after his appointment.⁷ A set-off may be pleaded in an action by a receiver of an insolvent bank.⁸ It has been held that a receiver, being a mere agent of the court, cannot appeal from an order made in the case, unless authorized so to do by the court.⁹ A receiver appointed in an action to enforce payment of the statutory liability of a corporation may, by authority of the court, prosecute in his own name actions to enforce payment of judgments rendered for such statutory liability.¹⁰

¹ *Showalter v. Improvement Co.*, 88 Tex. 162; *Cook on S. & S.*, sec. 208.

² *Mathis v. Pridham*, 20 S. W. Rep. 1015 (Tex., 1892). For form, see chapter on Subscription, sec. 1073.

³ *Wayne Pike Co. v. State*, 184 Ind. 672 (1893); *High on Rec.*, sec. 254; *Barton v. Barber*, 104 U. S. 126; *Elkhart Car Works Co. v. Ellis*, 118 Ind. 215; 15 N. E. Rep. 249; *Martin v. Atcheson*, 33 Pac. Rep. 47; 2 Idaho, 590; *Davis v. Creamery*, 128 Ind. 232. Such an application is addressed to the sound discretion of the court. *Meeker v. Sprague*, 31 Pac. Rep. 628; 5 Wash. St. 242; *Beach on Receivers*, sec. 650.

⁴ *King v. Cutts*, 24 Wis. 627. See *Battle v. Davis*, 66 N. C. 252.

⁵ *Davis v. Creamery Co.*, 128 Ind. 232; *High on Receivers*, sec. 650; *Moriarty v. Kent*, 71 Ind. 601; *Coope v. Bowles*, 28 How. Pr. 10; *Davis v. Sneed*, 33 Gratt. 705; *Battle v. Davis*, 66 N. C. 252; *Screven v. Clark*, 48 Ga. 41; *Garner v. Kent*, 70 Ind. 428. ⁶ *Schrock v. Schneider*, 29 O. S. 499.

⁷ *Caldwell v. Railroad Co.*, 2 O. C. C. 10.

⁸ *Hade v. McVey*, 31 O. S. 231.

⁹ *McKinnon v. Wolfenden*, 78 Wis. 237. See, also, generally, *Melendy v. Barbour*, 78 Wis. 544; *Dorsey v. Sibert*, 93 Ala. 312; *Davenport v. Dickinson*, 21 How. Pr. 275.

¹⁰ *Zieverink v. Kemper*, 50 O. S. 203.

Sec. 1070. Allegation of appointment in action by receiver.—

A. B., Receiver of — Company, }
 vs.
 O. D. }

A. B., receiver of the — Company, says: That on the — day of —, 18—, in an action then pending in the — court by A. B. against the said — Company for [*state cause of action*], the plaintiff was, by an order of said court [*or, the judge of said court*], duly appointed receiver of the said company, and duly authorized and empowered to sue in his own name upon any and all claims and demands due or to become due to said company.

NOTE.—See, also, petition for form of appointment, sec. 1078, *post*.

Sec. 1071. Actions against receiver.— Leave must also be obtained before a person can sustain an action against a receiver, and a person making such an application should give notice of the same to the receiver, though it is not essential that notice be given to the parties.¹ This requirement is for the protection of the receiver and may be waived, in which case no one else can take advantage of the omission. Nor does the failure to obtain leave affect the jurisdiction of the court.² A suit will never be permitted against a receiver when the judgment will in any manner affect the custody of the property in his hands; all questions should be settled in the pending litigation.³

¹ *Potter v. Bunnell*, 20 O. S. 150. receiver does not take away the jurisdiction of the court over the company or subject of the action. Nor can the defendant say that he will be sued only upon leave of the court appointing him, although if it is brought without leave the plaintiff may be guilty of contempt. *O. & M. R. R. Co. v. Nickless*, 71 Ind. 271-6. See *Elkhart Car Works v. Ellis*, 118 Ind. 215; *Davis v. Creamery Co.*, 128 Ind. 224.
² *Tobias v. Tobias*, 81 W. L. B. 371; 51 O. S. 519.
³ *Spinning v. Insurance Co.*, 2 *Disn.* 886.
 He cannot be sued in another court without leave of the court appointing him. *Kennedy v. Railroad Co.*, 5 W. L. B. 533. A person injured by a railroad may upon leave sustain an action against the receiver for the injury, and it is no defense that the receiver is a public officer. *Murphy v. Railroad Co.*, 20 O. S. 137; *O. & M. Railroad Co. v. Nickless*, 71 Ind. 271. Such a suit must be determined by the principle applicable to a like action against the company when operating the road. *Potter v. Bunnell*, 20 O. S. 150. The appointment of a

Sec. 1072. Averment of appointment in suit against receiver.—

[*Caption.*]

That on the — day of —, 18—, in an action then pending in the — circuit court by A. B. against the O. D. Company for the dissolution of a partnership then existing between said partners under the firm name of A. B. & Co., and for the appointment of a receiver, the defendant R. O. was duly appointed such receiver, and authorized by said court to settle and close up the business of said firm, and to pay all of the debts of the firm out of any money collected by him as such receiver.

Sec. 1073. Foreign receivers.—A receiver may be appointed to take charge of property in a foreign country where the owners are all within the jurisdiction of the court.¹ A receiver cannot have any power outside of his own jurisdiction and ordinarily cannot sue in his own name in another state, but the action must be brought in the names of the original parties.² But some courts, by reason of the comity existing between the states which is recognized as a part of the common law, generally and very properly allow foreign receivers to prosecute actions in other states, when it may be done without contravening the laws of such foreign state, or interfering with the rights of domestic creditors.³ The courts of New Jersey, however, do not refuse to recognize a foreign receiver on the ground that one of its citizens may be injuriously affected, when the receiver prosecutes the action on behalf of a citizen of its own state.⁴ It has been held that a receiver appointed by a United States court may sue in a state court, upon a contract made by the corporation in the corporate name, without designating in the petition his own name as receiver.⁵

¹ Barber v. Lockard, 11 W. L. B. 221; High on Receivers, secs. 239-241; 819 (C. S. C. R., 1877). Beach on Receivers, sec. 682. In

² Parkinson v. Bank, 4 Am. Law Rec. 401 (C. S. C. R., 1875); Booth v. Clark, 17 How. 322. Ohio and Pennsylvania the suit must be brought in the name of the original parties. Parkinson v. Bank,

³ In re Waite, 99 N. Y. 448; Wyman v. Manufacturing Co., 48 Kan. 294. *supra*; Yaeger v. Wallis, 44 Pa. St.

777; 30 Pac. Rep. 168; Comstock v. Frederickson, 53 N. W. Rep. 713 (N. J., 1892).

(Minn., 1892); Rogers v. Haines, 11 So. Rep. 651 (Ala., 1892); Ogden v. Warren, 36 Neb. 715; 55 N. W. Rep. 513 (N. S.) 783 (C. S. C. R., 1866).

⁴ Falk v. Janes, 23 Atl. Rep. 818 (N. J., 1892).

⁵ O. & M. Railroad Co. v. Railroad Co., 5 Am. Law Reg. (N. S.) 783 (C. S. C. R., 1866).

Sec. 1074. Application of receiver for leave to sell property.—

[Caption of case in which appointment was made and averment of appointment.]

A. B., the receiver heretofore appointed by this court, to wit, —, 18—, of the defendant, represents to the court that said defendant was the owner in fee-simple of certain *[real or personal]* property known and described as follows: *[Description, and if there are incumbrances, so state.]*

[If real estate, state:] That your petitioner has found no goods or chattels or choses in action of the said Y. Z. out of which any money can be made by collection, suit or sale; and the said land is the only available property.

Wherefore your petitioner asks an order allowing him as such receiver to sell said land at public auction, and convey all the right, title and interest of the said Y. Z. *[which he had on the — day of —, 18—]* in and to said premises; and that the said Y. Z. join in such deed if the purchaser require it, and for such other or further order as may be just *[and for the costs of this application]*.

Sec. 1075. Application of receiver for authority to pay claims.—

Your petitioner represents that he was duly appointed receiver of — by this court on the — day of —, 18—, with power to *[state power]*.

That the assets of said *[company or partnership]* consisted of *[state]*. That your petitioner on the — day of —, 18—, sold *[state property]* belonging to said —, from which he realized the sum of \$—, and has collected debts due said —, amounting to the sum of \$—, which said amounts constitute all the available assets of said —.

Your petitioner states that the following is a true and correct statement of all the indebtedness which has been presented to your receiver or come to his knowledge, to wit: *[Give list of creditors and amount.]*

Your petitioner states that he published a notice for — consecutive weeks, requiring creditors to present their claims to your petitioner, and that he knows of no other persons who are creditors of said — than those above given.

Your petitioner therefore asks that an order be made directing him to distribute the said sum of \$—, *pro rata*, to the aforesaid creditors as they may be entitled, and for such relief as may seem proper.

NOTE.—A receiver cannot declare a dividend without an order of court. High on Rec., 175.

Sec. 1076. Petition to be allowed to account and be discharged.—

[Caption and averment of appointment.]

That your petitioner has since then performed the duties of this office and executed all the trusts of the same so far as he has been able to do so, and has collected all the assets known to him of said corporation; duly advertised for all claims against the same, and discharged all claims presented; and there are no creditors of said corporation to the knowledge of your petitioner *[or state exceptions, if any, so that the order may reserve them]*.

That according to the annexed accounts of your petitioner there remain, after paying the necessary expenses and charges of said trust, together with a proper compensation to the receiver, no assets of value for distribution among the stockholders *[or state what, if any]*.

That no suits or legal proceedings in respect to said corporation or receivership are now pending to the knowledge of your petitioner; nor does any duty remain to be performed by said receiver except to have his accounts finally settled *[or state exceptions, if any, so that the order may reserve them]*.

Wherefore your petitioner prays that this court may finally settle and allow his accounts as such receiver, and award him suitable compensation for the performance of his said duties, and for an order relieving and discharging your petitioner as said receiver, and ordering his bond to be canceled, and for such other and further order as may be just.

NOTE.— R. S., sec. 5670.

Sec. 1077. Formal parts of account.—

[Caption.]

A. B., heretofore appointed receiver of the defendant, respectfully submits to the court the following account of his proceedings as such receiver:

[State facts as to administration of the trust, so far as material to explain and justify the account, as thus:]

Schedule A, hereto annexed, contains a statement of all the moneys received or collected by me or my said agent.

Schedule B, hereto annexed, contains a detailed statement of all moneys expended by me in the execution of my said trust, together with the object of such expenditure.

All the receipts, statements and vouchers hereto annexed form part of this account.

I charge myself as follows:

Gross receipts as shown by Schedule A..... \$—

I credit myself as follows:

Total expenditures as shown by Schedule B..... \$—

Leaving a balance of..... \$—

Which consists of *[state items, as cash in a designated trust]*

company, or unrealized assets, etc.], to be distributed, subject, however, to the deduction of the amount of my commission and the expenses of this accounting.

The said schedules, which are severally signed by me, are part of this account.

Affidavit of receiver to his account.

R. C., of —, the receiver of [rents and profits of the estate in question] in this cause, being duly sworn, says:

That the foregoing account contains, according to the best of this deponent's knowledge and belief, a full and true account of all the [rents and profits of the said estate for one year, ending on the — day of —, 18—, being from the foot of his former account, and of the former rents returned by his said former account to be in arrear and unreceived at the time of the making up the same], which have been received by this deponent, or any other person by his order or for his use, down to the — day of —, 18—; that he has been charged therein for all moneys received by him and embraced in said account, for which he is legally accountable; and that the moneys stated in said account as collected were all that were collectible, according to the best of his knowledge, information and belief.

That the several sums of money mentioned in the said foregoing account to have been paid or allowed were actually paid or allowed by this deponent for or on account of the said estate, and for the several purposes therein mentioned, according to the best of his knowledge and belief.

That he does not know of any error or omission in the said foregoing account to the prejudice of any of the parties interested in the funds or in the cause.

That the sums charged in the said account, for which no vouchers or other evidence of payment are produced, or for which he may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged.

CHAPTER 76.

REPLEVIN.

Sec. 1078. Nature of action — When it lies.	Sec. 1085. The affidavit.
1079. The petition.	1086. Affidavit in replevin by attorney.
1080. Petition in replevin — Ordinary form.	1087. Affidavit by one member of firm.
1081. Petition in replevin (from justice of the peace).	1088. Affidavit— Ordinary form.
1082. Petition by constable against sheriff.	1089. The delivery bond.
1083. Petition by mortgagees against mortgagor after condition broken.	1090. The redelivery bond.
1084. Petition against sheriff for recovery of exempt property.	1091. The answer.
	1092. Answer by sheriff.
	1093. Answer that defendant was in possession as agent, and that action was commenced without cause.

Sec. 1078. Nature of action — When it lies.— Replevin under the code is a civil action,¹ and lies for the delivery to the owner of property by one who unlawfully detains it.² The gist of the action is the unlawful detention of the property, although it need not in all cases be a manual possession in fact.³ So it will thus be seen that the distinction between the common-law actions of replevin and detinue has been abolished and merged under the code into the single action of replevin. It may be termed a mere possessory action, as a possessory right will sometimes prevail against an absolute legal title,⁴ the title necessary being only the right of possession;⁵ as, for instance, the holder of a chattel mortgage becomes, in the eye of the law, a general owner of the property, and after condition broken is entitled to the possession, and may therefore sustain an action of replevin for the recov-

¹ *Latimer v. Motter*, 26 O. S. 480-82. *Brown v. Holmes*, 18 Kan. 491;

² *State v. Jennings*, 14 O. S. 78. *Moore v. Kepner*, 7 Neb. 291.

³ *Collier v. Bickley*, 33 O. S. 523-533; *Williams v. West*, 2 O. S. 82; 144.

⁴ *Ensminger v. Jackson*, 73 Ind.

⁵ *Williams v. West*, 2 O. S. 82.

ery of the property mortgaged.¹ And so property sold upon condition that the ownership shall remain in the vendor until payment is made therefor,² as well as property purchased through fraud,³ or property sold with the expectation of immediate payment which is not made,⁴ or an insurance policy assigned under duress,⁵ or money if in specific parcels,⁶ or property fraudulently purchased by an insolvent person with no intention of paying for the same,⁷ may be reached by the writ of replevin.

The action can only be sustained against a person having the legal or actual possession at the time of the commencement of the suit;⁸ and property not actually or constructively in possession of the party named in the process cannot be reached.⁹ A national bank making a loan on a warehouse receipt for merchandise is a proper party defendant in an action by the consignor against a warehouse-keeper to whom the property has been committed.¹⁰ The action cannot be sustained against a plaintiff upon whose suit in attachment a constable has seized goods and retains them, where the writ was irregularly issued.¹¹ A person who has purchased prop-

¹ Robinson v. Fitch, 26 O. S. 659; ⁴ Edwards v. Glancy, 1 O. C. C. 453; McKinney v. Bank, 54 N. W. Rep. 968 (Neb., 1898). See Pullman Palace Car Co. v. Rolling Mill Co., 4 O. C. C. 301.
² Ashley v. Wright, 19 O. S. 291; Barber v. White, 37 Ill. 164; Johnson v. Nelson, 3 W. L. M. 306; Allen v. Kennedy, 49 Wis. 549. Where the mortgagor retains the possession and use of the property until the maturity of the debt, the mortgagee cannot, before condition broken, maintain the action. Curd v. Wunder, 5 O. S. 92. A plaintiff having a special interest will be entitled, under the code, to maintain the action. Brookover v. Esterly, 13 Kan. 149. Owners of separate mortgages cannot be joined as plaintiffs. Wehlen v. Macke, 15 W. L. B. 125.

³ Sanders v. Keber, 28 O. S. 630. See Sage v. Sluetz, 28 O. S. 1. No title vests until the price is paid. Wabash Elevator Co. v. Bank, 23 O. S. 311.
⁵ Allen v. Leggett, 1 W. L. M. 585. See Williams v. West, 2 O. S. 82.
⁶ State ex rel. v. Jennings, 14 O. S. 73.
⁷ Goldsmith v. Haine, 1 O. C. C. 833. If the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay, and void. Wilmot v. Lyon, 49 O. S. 296; Talcott v. Henderson, 31 O. S. 162.

⁸ Hurd v. Bickford, 27 Atl. Rep. 107 (Me., 1892).
⁹ Cleveland v. Shoeman, 40 O. S. 176.
¹⁰ Bogan v. Stoutenburgh, 7 O. (Pt. 2), 474.

erty prior to a levy made by an officer, who replevies the same from such officer, subsequent to which another levy is made upon the same property under another execution, and the property is sold, may maintain an action in replevin against the purchaser, even though it was found in the first action that the purchase was fraudulent.¹ A substitution of parties can only be made in cases where the property was taken under execution, and in which the application is made by the defendant and the party in whose favor the execution issued. This is discretionary with the court, and may be refused when the object of substitution is to deprive the court of jurisdiction.² The gist of the action is the unlawful possession of property. Where, therefore, defendant has disposed of the property and it is no longer in his possession, the proper remedy is not replevin, but an action for unlawful conversion.*

Sec. 1079. The petition.— It is said that the code does not require a petition in replevin to be in any specific form, but that it shall contain only a plain and concise statement of the cause of action.³ But the pleadings are peculiar and more formal than in ordinary actions. Some courts hold that allegations in the language of the statute are sufficient,⁴ and others that it is not necessary that the petition shall contain all the averments in the statute.⁵ It is generally conceded that a petition is good which states merely the ownership of the plaintiff, a right to the immediate possession and unlawful detention by the defendant.⁶ There is, however, an inclination to depart from the well-trodden paths. This is one of the actions in which we have been content to follow to some extent old methods and omit any very extended statement of facts. Indeed, the course pursued in the pleadings in this action, if followed in almost any other, would be subject to the objection of pleading conclusions of law. In fact, it has been held that general averments in a petition that a plaintiff has a special property in the goods, and that he is entitled to the immediate possession thereof, and that they are wrong-

¹ Crittendon v. Lingle, 14 O. S. 182.

² Sifford v. Beaty, 12 O. S. 189.

³ Railroad Co. v. Bayne, 75 N. Y. 1.

⁴ Jansen v. Effey, 10 Ia. 227.

⁵ Daniels v. Coe, 21 Neb. 157.

⁶ Bailey v. Swain, 45 O. S. 657. In a recent case it is said that a petition is sufficient which contains the following averments: Ownership of the

plaintiff, the right to the immediate possession, and that the property is wrongfully detained. Taylor v. Grever, 6 O. C. C. 269. In Daniels v. Coe, 21 Neb. 157, it was held sufficient if the petition states that the plaintiff is the owner of and entitled to the immediate possession and that the goods were unlawfully detained.

* Simper v. Bentley, 15 O. C. C. 515; 8 Oh. Dec. 356.

fully and unjustly detained, are mere propositions of law.¹ And so with an allegation that the defendant wrongfully detains property from the plaintiff.² While these general allegations have been considered sufficient, and have been followed generally in practice, there are cases in which the facts relating to the ownership or interest as well as other matters should be stated.³ Under some codes, the petition must state the extent of the interest of the plaintiff in the property.⁴

The interest of a mortgagee under a chattel mortgage is that of a general owner, and in the absence of a reservation he is entitled to the immediate possession, and a petition which states facts showing that the plaintiff is a general owner sufficiently describes his ownership.⁵ A petition for the recovery of chattel property alleged to have been leased, with a covenant entitling the lessor to possession on default in the payment of rent, which contains an averment of a default and that the lease was transferred to another without the knowledge of the lessor, and that demand for the return has been made, states a good cause of action.⁶ And where the particular facts entitling the plaintiff to the immediate possession of the property are stated, the title is sufficiently set forth although there is no general allegation of ownership.⁷ A petition which fails to allege that the property is wrongfully detained is fatal.⁸ The petition should also contain a description of the property sufficiently definite to identify it.⁹

¹ *Curtis v. Cutler*, 7 Neb. 315 (1878).

² *Schofield v. Whitelegge*, 49 N. Y. 259.

³ *Hoisington v. Armstrong*, 22 Kan. 110, in which it was held that the plaintiff was required to set forth only that he was the owner or had a special ownership or interest, stating the facts in relation thereto, giving a description, and that he was entitled to the immediate possession, and that the defendant wrongfully detained the same from him. See sec. 1084, form adopted from *Johnson v. Neal*, 32 Neb. 14; sec. 1083, form adopted from *Rogers v. Graham*, 36 Neb. 780; 55 N. W. Rep. 248, as illustrations.

⁴ *Kernan v. Wilson*, 73 Ia. 490.

⁵ *Robinson v. Fitch*, 26 O. S. 659;

Shur v. Stattler, 1 W. L. M. 317. Petition must affirmatively show that he is the owner. *Paup v. Sylvester*, 22 Ia. 371.

⁶ *Schofield v. Valentini*, 19 N. Y. S. 225.

⁷ *Visher v. Smith*, 91 Cal. 260.

⁸ *Entsminger v. Jackson*, 73 Ind. 144; *Le Roy v. Macconnell*, 8 Kan. 273; *Draper v. Ellis*, 18 Ia. 316.

⁹ *Pierce v. Langdon*, 2 Idaho, 878; 28 Pac. Rep. 401 (1891); *Wood v. Darnell*, 1 Ind. App. 215; *Hames v. Robinson*, 44 Ark. 308; *Entsminger v. Jackson*, *supra*. In describing mares it is not absolutely essential that they be described by their usual

Demand need only be alleged in cases where it must necessarily be made in order to terminate the right of possession in a defendant, where the property came into his possession lawfully,¹ and is not therefore essential where the possession is unlawful, as where an officer levies upon the wrong property with notice at the time.² Nor is it essential to negative the language of the statute, as that the property was not taken on execution or on an order or judgment against the plaintiff, as these allegations are required only in the affidavit.³ It is not the proper practice to make in a petition allegations sufficient to entitle a party to the delivery of the property, and annex thereto a single affidavit, both as to the verification of the petition and the necessary allegations for delivery of property, though such a petition has been held good.⁴ Where such a course has been taken, the writ may issue and an affidavit in proper form allowed to be filed.⁵ The code contemplates the filing of an affidavit separate from the petition.⁶ The plaintiff may recover any damages sustained by the wrongful detention of the property without specially alleging the same.⁷ And where the property has been returned to the defendant for want of an undertaking, the action may proceed as one for damages.⁸ The rule which requires fraud to be specially pleaded has no application to an action in replevin.⁹ Where goods have been obtained by a purchaser upon fraudulent representations, the vendor may, upon discovering the fraud, return the consideration paid, and

names, but a description as the "two — five years old" will answer. *Billby v. Townsend*, 29 Neb. 220 (1890).

¹ *Smith v. McLean*, 24 Ia. 322; *Shur v. Stattler*, 1 W. L. M. 317. In such cases a demand is held to be an essential prerequisite to the action. *Homan v. La Boo*, 1 Neb. 210; *Talcott v. Belding*, 4 J. & S. 84.

² *Bancroft v. Blizzard*, 13 O. 30; *Stone v. Bird*, 16 Kan. 448; *Shoemaker v. Simpson*, 16 Kan. 43. As to demand, see, also, *Federhen v. Smith*, 8 Allen, 119; *Badger v. Phinney*, 15 Mass. 564; *Grimes v. Briggs*, 110 Mass. 446; *O'Neil v. Bailey*, 68 Me.

429. An officer cannot seize under a writ property actually or constructively in the person named in the process. *State v. Jennings*, 14 O. S. 73.

³ *Daniel v. Coe*, 21 Neb. 157. And yet in forms adopted and approved in that state these allegations have been made.

⁴ *Bingham v. Hill*, 38 O. S. 657.

⁵ *Lewis v. Connolly*, 29 Neb. 223 (1890).

⁶ *Bingham v. Hill*, 38 O. S. 657.

⁷ *Clark v. Martin*, 120 Mass. 543.

⁸ *Pugh v. Calloway*, 10 O. S. 498.

⁹ *Soporis v. Truax*, 1 Colo. 89; *Snook v. Davis*, 6 Mich. 156.

reclaim the goods against any one not a *bona fide* purchaser;¹ and where a purchase has been made with an intention not to pay the purchase price, or without reasonable expectation of being able to pay the same, the goods may be recovered in an action of replevin.²

Sec. 1080. Petition in replevin — Ordinary form.—

The plaintiff says that he is the owner of and is entitled to the immediate possession of the following described property, namely, two hundred and one bushels and twenty-nine pounds of wheat, being part of the same wheat which was levied upon by the said H. as sheriff of — county, Ohio, at the suit of R. W. & Co. against J. D. J. and J. S.

That the defendant wrongfully detains in his possession the said property from the plaintiff.

Wherefore the plaintiff prays a judgment and order against the said defendant that he be ordered to deliver to him the said property.

B. G. S., Attorney for Plaintiff.

NOTE.—This form is taken from *Hall v. Watkins*, Supreme Court, unreported, No. 1707, and is a sufficient compliance with the rules stated in *Bailey v. Swaim*, 45 O. S. 658, and *Taylor v. Grever*, 6 O. C. C. 289. A form such as given in 2 Bates' Pldg., p. 690, and used in practice so long, which fails to state ownership, is objectionable. It may be better in many cases to make a detailed statement of facts as in sec. 1082, *post*. But ownership being a statement of fact (*ante*, sec. 50, p. 50, n. 7), the foregoing form will ordinarily be sufficient. A petition which does not allege a right of possession does not state a cause of action in replevin. *Taylor v. Grever*, 6 O. C. C. 272. The comments made by the author in the foregoing note, that a form which does not expressly allege ownership is subject to a demurrer, no doubt caused some discussion. They were made because of the fact that a demurrer was sustained to the form, in 2 Bates' Pldg. 690, by trial courts, and following *Taylor v. Grever*, 6 O. C. C. 289, and the form given by the Code Commissioners. Code Com. Rep. 249. The form in *Wilmot v. Lyon*, 11 O. C. C. 241, is not in accord with the form given by the Code Commissioners; and the comments of the Court, that the form is substantially that recommended by the Code Commissioners, may be true, but it omits the allegation given by the Code Commissioners: "Plaintiff says he is the owner," etc. But the Supreme Court in *Grever v. Taylor*, 53 O. S. 623-4, has approved the form in 2 Bates' Pldgs. 690, as well as the above. Nevertheless, to allege that plaintiff is entitled to the immediate possession, etc., is, without alleging ownership, a mere conclusion of law. *Abbott's Trial Brief on the Pleadings*, p. 294.

Sec. 1081. Petition in replevin (from justice of the peace).—

This case comes into this court on appeal from the judgment of A. B. G., a justice of the peace in and for — township, county of —, and state of Ohio.

Plaintiff is the owner of and entitled to the immediate possession of the following described property, to wit: [*Describe*.]

The said defendants, E. P. W. and E. B. P., wrongfully detain from plaintiffs the said goods and chattels of these plaintiffs, and have so wrongfully detained said goods and chattels for

¹ *Tootle v. Bank*, 34 Neb. 863; ² *Wilmot v. Lyon*, 49 O. S. 297; *Syms v. Benner*, 31 Neb. 593; *Cob-Talcott v. Henderson*, 31 O. S. 162. *bey on Replevin*, sec. 268.

the space of — days, to the damage of these plaintiffs in the sum of — dollars, with interest.

Wherefore these plaintiffs ask judgment against said defendants for the recovery of said property and for the sum of — dollars, with interest.

NOTE.—Changed from *Wilmot v. Lyon*, 49 O. S. 296. Where property has been purchased with the intention not to pay for the same the vendor may regain it in an action in replevin. *Id.*; *Talcott v. Henderson*, 31 O. S. 162. And in *Wilmot v. Lyon* the court charged that whether there is an intention to pay or not to pay is a question of fact. The mode of showing intent is by proof of its manifestations, acts done and circumstances surrounding the party in the transaction. *Oswego Starch Factory v. Lendrum*, 27 Ia. 573.

Sec. 1082. Petition by constable against sheriff.—

[*Caption.*]

Plaintiff is constable in — township, — county, Ohio, and as such constable received two writs of execution, issued by S. S., a justice of the peace in said township, in the case of J. M. M. against H. H. S., and that in pursuance of the command of said writ of execution he levied the same upon the goods and chattels of the said H. H. S., hereinafter described, on the — day of —, 18—, and thereby acquired a special ownership or interest in, and is entitled to the immediate possession of, the said goods and chattels, to wit: [*Description of goods.*]

Thereafter, to wit, on the — day of —, 18—, the defendant D. P., as sheriff of said county aforesaid, wrongfully made a levy upon said goods and chattels while in the hands of this plaintiff, and as such sheriff aforesaid wrongfully and unjustly detains in his possession the said goods and chattels from the said plaintiff, and has detained the same as aforesaid for the space of ten days, to his damage in the sum of \$—. Plaintiff therefore prays judgment against the said defendant, that he, the said defendant, do return to plaintiff the aforesaid goods so unlawfully detained, and for the sum of \$—, his damages so as aforesaid sustained by reason of said unlawful detention.

NOTE.—From *Pugh v. Calloway*, 10 O. S. 483.

Sec. 1083. Petition by mortgagee against mortgagor after condition broken.—

The plaintiff says that on the — day of —, 18—, the defendant made, executed and delivered to the plaintiff a note for the sum of \$—, payable to plaintiff, due on the — day of —, 18—. At the time of the delivery of said note, and to secure the payment of the same, said defendant also executed and delivered to plaintiff a certain chattel mortgage upon the following chattel property, to wit: [*Description.*] That the conditions of such mortgage were: [*The conditions may here briefly be given.*]

That the said note became due and payable on the — day of —, 18—, no part of which has been paid, and the conditions of such mortgage have been broken, and plaintiff

demanding possession of said property from said defendant. Plaintiff is the general owner of the property hereinbefore described, and is entitled to the immediate possession of the same. That said goods and chattels are wrongfully detained from plaintiff by the said defendant, [and were not taken on process issued against the plaintiff, and are not claimed by him under a title acquired mediately or immediately by transfer from one from whom such property had been taken by such execution, order or process, nor for a tax].

Wherefore plaintiff prays for judgment against the defendant for the possession of said property, or, in case the possession thereof cannot be had, for a judgment against the defendant for the value thereof, and the costs herein expended.

NOTE.—Adapted from *Rodgers v. Graham*, 36 Neb. 730; 55 N. W. Rep. 243 (1893), where the petition was approved.

Sec. 1084. Petition against sheriff for recovery of exempt property.—

That the defendant was the duly appointed and qualified sheriff of — county, —, from the — day of —, 18—, to the — day of —, 18—.

That the plaintiff is the owner of and entitled to the immediate possession of the following described goods and chattels, to wit: [*description*], being now in the possession of said defendant, and which he still holds, and which are of the value of \$—.

That defendant wrongfully detains said goods and chattels from the possession of plaintiff, and has wrongfully detained the same, to plaintiff's damage in the sum of \$—.

That said property was seized by said defendant, as sheriff of said county, under an execution issued against the plaintiff. That plaintiff was at the time of levying said execution, and still is, a resident of this state, and the head of a family, and is not the owner of any homestead; and that said property is exempt from execution, expressly [*or, upon demand and selection, as the case may be*].

Plaintiff therefore asks judgment against said defendant for the recovery of said property, and for the sum of \$—.

NOTE.—Adapted from *Johnson v. Neal*, 32 Neb. 14, where the form was substantially approved. See 33 O. L. 278.

Sec. 1085. The affidavit.—There must be filed with the petition a separate affidavit for the delivery of property to plaintiff, which must contain a description of the property claimed, stating that the plaintiff is the owner or has an interest therein; and if the ownership or interest is special or partial, the facts must be stated, also that the property is wrongfully detained by the defendant; that it was not taken on process issued against the plaintiff, and is not claimed by him under a title acquired mediately or immediately by transfer

from one from whom such property had been taken by execution, order or process, nor for a tax; or if taken on such process, that the property was exempt from execution expressly, or upon demand or selection by the plaintiff.¹ A writ cannot issue without a proper affidavit,² but it forms no part of the pleadings.³ The requirement as to what the affidavit shall contain is imperative, and all the facts must be sworn to before the action can be maintained.⁴ It may, upon notice, be amended,⁵ in furtherance of justice, upon proper terms,⁶ at any time before trial or on trial,⁷ and the truth of its allegations may be inquired into by motion.⁸ If the affidavit is defective, the defendant may move to dismiss, in which case an amendment may be made; and unless objection be taken to the affidavit, the same cannot thereafter be raised in a proceeding in error.⁹

Sec. 1086. Affidavit in replevin by attorney.—

D. C. B., being duly sworn, says he is the attorney [*or, agent*] of plaintiff in this action, duly authorized in the premises, and the property to recover possession of which this action is brought is described as follows, to wit: The entire stock of jewelry, watches, clocks and silverware and plated ware and all goods in the store occupied by said N. C., on the east side of M. street, L., Ohio; also one show-case and all the fixtures to said store; also one Hall's fire-proof safe in said store; also one window show-case and one large regulator clock.

The plaintiff is the owner thereof as mortgagee. Said property is wrongfully detained from plaintiff by defendants.

Said property was not taken on process issued against this plaintiff nor for a tax.

D. C. B.

Sworn to before me and subscribed in my presence this — day of —, 18—, etc., as in Fourth Subdivision in R. S., sec. 5895.

A. B.

NOTE.— From *Oskamp v. Carman*, Supreme Court, unreported.

Sec. 1087. Affidavit by one member of firm.—

P. M. K., being duly sworn, deposes and says that he is one of the members of the firm composed of J. H. L. and P. M. K.,

¹ 88 O. L. 273; *Whittaker's Ohio Civ. Code*, p. 460 (4th Rev. ed.).

² *Xenia Twine & C. Co. v. Hooven*, 25 W. L. B. 10.

³ *Hoisington v. Armstrong*, 22 Kan. 110.

⁴ *Westenberger v. Wheaton*, 9 Kan. 169.

⁵ *Van Halen v. Ridgeway*, 1 W. L. M. 280.

⁶ *Gaiser v. Van Heim*, 8 O. C. C. 120.

⁷ *Cobbey on Replevin*, sec. 569.

⁸ *Xenia Twine & C. Co. v. Hooven*, 25 W. L. B. 10.

⁹ *Gaiser v. Van Heim*, 8 O. C. C. 120.

partners, doing business under the firm name and style of J. H. L. & Co., and this affiant further deposes and says:

1st. That said J. H. L. *et al.* are the owners of the following described property, to wit: Fifteen bales of gunny bagging and one coil and two bales of manilla rope of the value of about \$——.

2d. That said J. H. L. *et al.* are entitled to the immediate possession of said property.

3d. That said property is wrongfully detained by one E. P. W. and E. B. P.

4th. That the said property was not taken in execution on any order or judgment against said J. H. L. *et al.*, or for the payment of any tax, fine or amercement assessed against them, or by virtue of an order of delivery issued in replevin, or any other means or final process against them, or other grounds in R. S., sec. 5815.

NOTE.—From *Wilmot v. Lyon*, 49 O. S. 296.

Sec. 1088. Affidavit—Ordinary form.—

[*Caption.*]

A. B., being duly sworn, upon his oath says:

That he is the plaintiff in the above-entitled cause.

That he is [the owner of and] lawfully entitled to the possession of the following personal property, to wit: One bay horse, six years of age, with white star in forehead and white hind feet, called and known as "Longfellow."

That said horse has not been taken on process issued against plaintiff, and is not claimed by him under a title acquired mediately or immediately by transfer from one from whom such property had been taken by such execution order or process, nor for a tax [or, that the same was seized and is held by the defendant under an execution issued from the —— court on a judgment recovered therein by one R. D. against the affiant, but said property is exempt from execution].

That said horse [has been wrongfully taken and] is unlawfully detained by the defendant.

That said horse is of the value of —— dollars, and is now detained in —— county, state of Ohio.

A. B.

[*Jurat.*]

NOTE.—R. S., sec. 5815.

Sec. 1089. The delivery bond.—As the law in Ohio now stands, the property cannot be delivered to the plaintiff until after the expiration of five days from the time it is taken, and until the plaintiff has executed an undertaking conditioned that the plaintiff shall prosecute the action and return the property taken or pay the value assessed if judgment be rendered against him, at the election of the defendant, as well as all damages which may be assessed.¹ The interest of the

¹ 89 O. L. 273; Whittaker's Ohio Civ. Code, p. 461 (4th Rev. ed.).

defendant in the property taken vests in the plaintiff only conditionally upon his giving bond. If the defendant elects to have the property returned, he is entitled to do so, but must elect to take all or none.¹ The rule early laid down and frequently asserted in practice, that the bond takes the place of the property, is well founded,² and is not changed by the new enactment.³ It takes the place of the property, however, only to the extent of the interest of the defendant in replevin.⁴ The right of the defendant to retain the property can only be exercised in strict accord with the terms of the statute. The reason of the provision prohibiting the officer from delivering the property to the plaintiff until after the expiration of five days is to give the defendant an opportunity to make his election within that period, which must be done or his rights under the statute are gone. If he fails to make the election within that period, he cannot compel the plaintiff to return the property until the determination of the suit, as his right of election is forever gone,⁵ and he is remitted for his rights to the bond given by the plaintiff.

Sec. 1090. The redelivery bond.—The defendant is given the right at any time within five days after the issuance of the writ to elect to retain the property upon the condition that he shall execute an undertaking to the plaintiff that he will return the property or pay the value assessed, at the election of the plaintiff, as well as to pay all damages and costs if the suit be decided against him.⁶ The defendant may elect to take the property at the end of the litigation by serving notice upon the officer within ten days after the seizure that he will so demand it.⁷ But he cannot elect to take part only.⁸

Sec. 1091. The answer.—The code has not materially departed from the common-law system of pleading in this action, and a defendant may therefore, under a general denial, raise

¹ *Simper v. White*, 7 O. C. C. 303.

⁵ *Hunt v. Williams*, 7 O. C. C. 224.

² *Smith v. McGregor*, 10 O. S. 461;

Crittenden v. Single, 14 O. S. 185;

Carty v. Fenstermaker, 14 O. S. 463.

³ *Knight v. Kinney*, 7 O. C. C. 50

(1893): 88 O. L. 273.

⁴ *Smith v. McGregor*, 10 O. S. 461;

Lugenbeal v. Lemert, 42 O. S. 1.

⁶ 88 O. L. 274; *Whittaker's Ohio Civ. Code*, pp. 462-63 (4th Rev. ed.).

⁷ *Hunt v. Williams*, 7 O. C. C. 224;

88 O. L. 273.

⁸ *Simper v. White*, 7 O. C. C. 703.

an issue upon any material allegation in the petition, and introduce evidence barring the action;¹ and is not subject to a demurrer for want of a statement of facts.² In fact the whole question of ownership may be investigated under it.³ A defendant may show that as an officer he levied upon the goods at the suit of a creditor of one from whom the plaintiff obtained them, and that the transfer to the latter was fraudulent and void as against creditors;⁴ or an officer may prove that he levied upon the property under a writ of execution.⁵ It raises the issue not only of the right of possession, but of every collateral fact necessary to establish the same as well;⁶ and title in a stranger may be shown even though not connected with the defendant.⁷ An answer that the defendant does not lawfully detain the goods and chattels raises an issue as to the right of plaintiff to the property and possession.⁸ And under a denial of possession a defendant may show that although he had a right of possession he had waived it by agreement.⁹ In an action by a mortgagee, a defendant under a denial may prove a sale of the property to him by the plaintiff subsequent to the execution and delivery of the mortgage, and his refusal to take the goods and pay the contract price.¹⁰ There is a conflict in the rulings of two courts of inferior jurisdiction as to whether a plea of *non detinet* is a valid defense, under which it may be shown that the defendant does not in fact detain the property, and as to whether or not it raises any question of title.¹¹ An action cannot be de-

¹ *School District v. Shoemaker*, 5 Neb. 36; *White v. Genmey*, 47 Kan. 741. *Wedgewood*, 25 Neb. 288; *Rodgers v. Graham*, 36 Neb. 780; 55 N. W. Rep. 248 (1898).

² *Carman v. Ross*, 64 Cal. 247.

⁵ *Moravee v. Buckley*, 11 W. L. R. 225; 10 O. S. 444; 12 O. S. 112.

³ *Bank v. Bain*, 20 Neb. 294; 30 N. W. Rep. 64; *Cool v. Roche*, 15 Neb. 24; *Richardson v. Steel*, 9 Neb. 483. *Cf. Richardson v. Smith*, 29 Cal. 580. It puts in issue every allegation in the pleading which it denies and cannot be considered as a negative pregnant. *German American Bank v. White*, 38 Minn. 471.

⁶ *Aultman v. Stickler*, 21 Neb. 72; *Kennedy v. Shaw*, 38 Ind. 474; *Sparks v. Heritage*, 45 Ind. 66.

⁷ *Griffin v. Railroad Co.*, 101 N. Y. 348; *Lane v. Sparks*, 75 Ind. 278; *McKyring v. Bull*, 16 N. Y. 297.

⁸ *Moore v. Kepner*, 7 Neb. 291.

⁴ *Bailey v. Swain*, 45 O. S. 657; *Taylor v. Grever*, 6 O. C. C. 271; *Oaks v. Wyatt*, 10 O. 344; *Farrell v. Humphrey*, 12 O. 113; *Merrill v.*

⁹ *Timberlake v. McCarthers*, 8 Am. Law Rec. 718.

¹⁰ *Deford v. Hutchinson*, 45 Kan. 318.

¹¹ *Shearer v. Stattler*, 1 W. L. M. 317; *Kelly v. Blakly*, 2 W. L. M. 151.

feated by an assignment of the property by the defendant for the benefit of creditors.¹

Sec. 1092. Answer by sheriff.—

[*Caption.*]

Said defendant for his defense herein says that at the time of the commencement of this suit he was the duly elected and qualified sheriff of said — county; that at the time of the commencement of this action, he, as such sheriff, held three several writs of execution, one in favor of R., W. & Co., against J. D. J. and J. E. S., for — dollars and costs of suit, upon a judgment rendered in favor of said R., W. & Co. against said J. D. J. and J. E. S., rendered by the court of common pleas of — county, Ohio, —, 18—; one in favor of L. N. Y. against the said J. D. J., upon a transcript filed in the clerk's office of said — county, for the sum of — dollars and costs of suit; one in favor of E. P. against the said J. D. J., upon a transcript filed in the clerk's office of said — county, for the sum of — dollars and costs of suit.

That the said defendant, before the commencement of this suit, had duly levied the said several writs of execution upon the property described in the plaintiff's petition as the property of said J. D. J., and the same was at the time of such levy the property of said J. D. J., and that by virtue of said levy the defendant, as such sheriff, had a special ownership in said property, and was entitled to the possession of the same at the time of the commencement of this action.

Defendant therefore asks judgment against the said plaintiff for the value of the property described in the said plaintiff's petition, together with costs of suit, and for all proper relief.

Sec. 1093. Answer that defendant was in possession as agent and that action was commenced without cause.—

E. P. W., one of the defendants, for his answer says he denies all the allegations contained in plaintiffs' petition. And further answering, he says that on or about —, 18—, he was, as agent for B., F. & Co. and ten others, in the lawful possession of fifteen bales gunny bagging and one coil and two bales of manilla rope, of all which plaintiffs deprived him by process issued in this case. That this action was commenced without any reasonable or probable cause and maliciously, and thereby this defendant and those represented by him suffered damages in excess of the actual value of said articles so replevied. This defendant says that, including the value of said articles, he has been damaged in the sum of — dollars, for which he prays judgment against plaintiffs.

E., D. & S., Defendants' Attorneys.

NOTE.—From *Wilmot v. Lyon*, 49 O. S. 297.

¹ *Collier v. Bickley*, 38 O. S. 523.

CHAPTER 77.

REFORMATION, RESCISSION AND CANCELLATION.

<p>Sec. 1094. Parties to actions for reformation.</p> <p>1095. Reformation — The petition.</p> <p>1096. Instrument may be reformed and enforced in same action.</p> <p>1097. Petition for reformation of deed as to description.</p> <p>1098. Reformation — Defenses.</p> <p>1099. Parties to actions for rescission and cancellation.</p> <p>1100. Rescission and cancellation — The petition.</p>	<p>Sec. 1101. Petition to cancel deed made by illiterate person.</p> <p>1102. Petition by grantee to rescind sale for want of title in grantor.</p> <p>1103. Petition to rescind contract for sale of land.</p> <p>1104. Petition by vendee against vendor to set aside an agreement relating to lands on the ground of defect of title — (Fraud).</p> <p>1105. Petition to annul stock subscription.</p> <p>1106. Answer that contract was rescinded.</p>
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Sec. 1094. Parties to actions for reformation.— If the action is brought to correct a misdescription running through the deeds of several prior grantors, each grantor, or if deceased their heirs, should be made parties.¹ A grantee may maintain an action to reform an erroneous deed in his own chain of title;² in such an action by the grantee who has sold a portion of the premises, using the erroneous description, to reform the same he should make his own grantee a party.³ If a deed be copied by the recording officer with the incorrect description, such recorder is not a proper party.⁴ But relief can-

¹ *Flanders v. McClanahan*, 24 Ia. 486; *Thomas v. Kennedy*, 24 Ia. 397; *Witte v. Lockwood*, 89 O. S. 143; *Pomeroy's Rem.* 371.

² *Gwyer v. Spaulding*, 83 Neb. 573; 50 N. W. Rep. 681; *Cox v. Ellsworth*, 18 Neb. 664; *Buzzby v. Littlefield*, 31 N. H. 193; *May v. Adams*, 58 Vt. 74; *Parker v. Starr*, 21 Neb. 680.

³ *McLennan v. Johnson*, 60 Ill. 306. And the holder of an equity of re-

demption, not barred by lapse of time, should be made a party to suit to reform a deed. *Pierce v. Faunce*, 47 Me. 507.

⁴ *King v. Bales*, 44 Ind. 219. Reformation may be had on the ground of mistake not only between the immediate parties but also against creditors and purchasers who have either actual or constructive notice. *Dozier v. Mitchell*, 65 Ala. 511; *Baskins v. Cal-*

not be had against an innocent purchaser;¹ a judgment creditor, however, is not such a purchaser.² Reformation may also be had in a conveyance between husband and wife.³

Sec. 1095. Reformation — The petition.— Reformation of instruments is based upon the equitable maxim "that he who seeks equity must do equity," and the one seeking relief, therefore, must have performed all acts required of him, and must stand upon an equity superior to that of the party against whom relief is asked.⁴ The causes for which relief is most commonly granted are mistake and fraud. It is well settled that the mistake must be ordinarily one of fact,⁵ although it has been held that relief may sometimes be had where the mistake made is in the legal effect of the instrument,⁶ although such cases are rare.⁷

If the ground of relief be both mistake and fraud, the petition must clearly set forth the facts upon which each of such grounds is based. Relief cannot be had against fraud when only mistake is alleged in the petition, nor can relief be had on ground of mistake when fraud only is alleged.⁸ A petition to reform an instrument upon the ground of mistake, or in

houn, 45 Ala. 582; Williams v. Hatch, 88 Ala. 338; Berry v. Sowell, 73 Ala. 14; 1 Story's Equity, 165, 166; Carver v. Lassallette, 57 Wis. 233.

¹ Lowe v. Allen, 68 Ga. 225; Davidson v. Davidson, 42 Ark. 362; Burke v. Anderson, 40 Ga. 535.

² Burke v. Anderson, *supra*; Lowe v. Allen, *supra*.

³ Highland v. Highland, 19 Oreg. 51; Parker v. Parker, 68 Ala. 362.

⁴ Conaway v. Gore, 24 Kan. 339.

⁵ Welles v. Yates, 44 N. Y. 525; Hoy v. Insurance Co., 77 N. Y. 235; Smith v. Jordan, 13 Minn. 264; s. c., 97 Am. Dec. 232; Kilmer v. Smith, 77 N. Y. 226; s. c., 33 Am. Rep. 618; Turner v. Shaw, 9 Am. St. Rep. 319; Beach's Equity, 544; Born v. Screnkens, 110 N. Y. 55.

⁶ Evans v. Strode, 11 O. 480; s. c., 38 Am. Dec. 744; Horst v. Dague, 34 O. S. 376; Rindskoff v. Donan, 28 O. S. 520; Globe Ins. Co. v. Boyle, 31

O. S. 119. See Pitcher v. Hennessey, 48 N. Y. 415; Beach's Equity, sec. 540; Clayton v. Freet, 10 O. S. 544; Thompson v. Thompson, 18 O. S. 73. See ch. 60, sec. 823, Mistake.

⁷ Storrs v. Barker, 6 John. Ch. 166. See, also, Leavitt v. Palmer, 3 N. Y. 19; s. c., 51 Am. Dec. 333; Jordan v. Stevens, 51 Me. 78; s. c., 81 Am. Dec. 556; Bint v. Wilson, 28 Cal. 632; s. c., 87 Am. Dec. 142.

⁸ Stephens v. Murton, 6 Oreg. 193; Brintnall v. Briggs, 54 N. W. Rep. 531 (Iowa, 1893); Michael v. Kilmer, 76 N. Y. 36; Rushton v. Hallett, 8 Utah, 277; 80 Pac. Rep. 1014. See Higgins v. Parsons, 65 Cal. 280; Williams v. Huyck, 71 Ia. 459; Taylor v. Devorell, 43 Kan. 469; 8 Pomeroy's Eq. sec. 1376; Leighton v. Grant, 20 Minn. 345. Fraud on one side and mistake on the other will authorize relief. Wells v. Yates, 44 N. Y. 525.

deed upon any ground, must allege the facts, by stating the transaction as it actually occurred, that the parties truly agreed to do something, and that the mistake did not occur from the negligence or carelessness of the plaintiff.¹ Even one who has carelessly executed a deed under a fraudulent misrepresentation may have relief against the grantee, but not against a subsequent innocent purchaser for value.² A petition which does not contain an averment that the mistake was mutual is fatally defective.³ An allegation that it was the mutual understanding and intention of the parties that the land in controversy should be described and conveyed by the deed has been held sufficient;⁴ and so with a statement that the grantor and grantee were ignorant of its contents.⁵ It is not necessary to aver that the rights of third persons have not intervened, as the law will not presume that any such rights have accrued.⁶

A mistake in the description will be corrected not only against mortgagors, but creditors as well.⁷ In framing allegations as to an erroneous description, the mistake therein will be plainly set out by giving the true and false description and alleging mistake.⁸ An averment that the description was different from that intended by the parties has been held to be sufficient in the absence of a demurrer.⁹ A deed may be corrected where the name of the grantee has been omitted by mistake or inadvertence.¹⁰ Or a mistake of a scrivener, by inserting a stipulation to the effect that the grantor assumed

¹ *Highland v. Highland*, 19 Oreg. N. Y. S. 84; s. c., 68 Hun, 299. See, 51; *Lewis v. Lewis*, 5 Oreg. 169; also, *Schoonover v. Dougherty*, 65 Meier v. Kelley, 20 Oreg. 86; 25 Pac. Ind. 468.

Rep. 78; *Roundy v. Kent*, 75 Ia. 662; *Jackson v. Andrews*, 59 N. Y. 244.

² *Davidson v. Davidson*, 42 Ark. 362.

³ *Paine v. Jones*, 75 N. Y. 598; *Conaway v. Gore*, 24 Kan. 389; *Schoonover v. Dougherty*, 65 Ind. 468; *Easter v. Severin*, 64 Ind. 875; *Jackson v. Andrews*, 59 N. Y. 244.

⁴ *Seegelken v. Corey*, 98 Cal. 92; 28 Pac. Rep. 849. The plaintiff must clearly establish the intention which he claims to be concurrently in the minds of the parties at the time of the execution. *Roberts v. Derby*, 28

⁵ *Nicholson v. Caress*, 59 Ind. 89.

⁶ *Edwards v. Sams*, 8 Bradw. 168.

⁷ *Strang v. Beach*, 11 O. S. 233; *Van Thorniley v. Peters*, 26 O. S. 471; *Andrews v. Gillespie*, 47 N. Y. 487.

⁸ *Ramsey v. Loomis*, 6 Oreg. 367.

⁹ *Newton v. Hull*, 90 Cal. 487.

¹⁰ *Strang v. Beach*, 11 O. S. 233; *Goshorn v. Purcell*, 11 O. S. 641; *Hitesman v. Donnel*, 40 O. S. 287. See *Clements v. Noble*, 40 O. S. 41; *Neinenger v. State*, 50 O. S. 394; 34 N. E. Rep. 633.

and agreed to pay a mortgage, may be relieved against, even though the purchaser is ignorant of the mistake until suit is brought.¹ And a deed may be so reformed as to make it include a portion of the premises erroneously omitted,² or to convey a life estate instead of a fee-simple;³ or a defectively acknowledged deed may be reformed by enlarging a life estate into a fee-simple.⁴ A mistake in making a deed is considered as having been made at the time when the agreement was entered into, and not at the time of the execution and delivery of the deed.⁵

A grantee of a purely voluntary deed supported by no consideration cannot have it reformed;⁶ nor can an instrument be reformed so as to include therein a contemporaneous oral agreement, unless fraud, accident or mistake be alleged;⁷ nor can the fact that purchase-money was not furnished equally by two joint purchasers be made a ground for the reformation of a deed in a collateral proceeding where such reformation is not an issue;⁸ nor can a mistake of a scrivener in omitting a reservation be corrected if it will prejudice a lien-holder whose debt has been contracted upon the faith of the vendee's ownership.⁹ A demand for the reformation of a deed should be made upon the grantee before commencing the action.¹⁰ An allegation that the plaintiffs were ignorant and illiterate persons, and did not understand the meaning of the language used, is not of itself sufficient to support an action for reformation.¹¹ In an action to reform a deed on the ground of mistake in the omission of words of inheritance, the petition

¹ *Adams v. Wheeler*, 122 Ind. 251.

² *Critchfield v. Klein*, 39 Kan. 731; *Taylor v. Deverell*, 43 Kan. 469.

³ *Clayton v. Freet*, 10 O. S. 545.

⁴ *Ormsby v. Longworth*, 11 O. S. 653.

⁵ *Cleghorn v. Zumwalt*, 83 Cal. 155.

⁶ *Conaway v. Gore*, 24 Kan. 389; *Waite v. Smith*, 92 Ill. 335; *Gwyer v. Spaulding*, 83 Neb. 573; 50 N. W. Rep. 681 (1891).

⁷ *Brintnall v. Briggs*, 54 N. W. Rep. 531 (Ia., 1893).

⁸ *Thompson v. Peak*, 17 S. E. Rep. 45 (S. C., 1893).

⁹ *Lough v. Michael*, 17 S. E. Rep.

181 (W. Va., 1893). The act of an agent in drawing a deed which fails to include a reservation is the act of his principal, hence mutual, and may be relieved against. *Warwick v. Smith*, 187 Ill. 504.

¹⁰ *Popejoy v. Miller*, 33 N. E. Rep. 713; 133 Ind. 19; *Axtel v. Chase*, 77 Ind. 74; *Koons v. Blanton*, 129 Ind. 333; 27 N. E. Rep. 334.

¹¹ *Archer v. Lumber Co.*, 33 Pac. Rep. 526 (Oreg., 1893). Otherwise, if the action was taken upon the advice of counsel. *Id.*

should state that at the time of the execution it was the intention to create an estate in fee-simple, and that the parties were ignorant of its precise contents.¹ A defendant in an action for the recovery of real property may, notwithstanding such action, prosecute a suit to correct mistakes in the deeds under which the parties claim.²

Sec. 1096. Instrument may be reformed and enforced in same action.— A contract may be reformed and enforced in the same action,³ or relief granted on the same as reformed,⁴ although it is not ordinarily the function of equity to restore the plaintiff to what he has lost by mistake or fraud, but to reform the instrument so as to enable him to assert his rights at law. Reformation is therefore an auxiliary proceeding;⁵ and the instrument must first be reformed before recovery can be had thereon.⁶ A rule has been adopted that where an issue at law is raised as well as an equitable one, the court may properly first dispose of the equitable issue before determining the legal one, which would certainly be applicable to a case where reformation was asked.⁷ The method of trial of each issue is of some importance. It may be essential that the equitable cause of action be first disposed of, especially when the legal cause of action necessarily depends upon the existence of the equitable cause. It may be that the equitable cause will defeat the legal one.⁸ It must be remembered that a rule prevails that the mode of trial is governed by the primary relief prayed for.⁹

¹ *Nicholson v. Carees*, 59 Ind. 89.

² *Witte v. Lockwood*, 39 O. S. 141.

³ *Railroad Co. v. Steinfeld*, 42 O. S. 449; *Globe Ins. Co. v. Boyle*, 21 O. S. 119; *Evants v. Strode*, 11 O. 480.

⁴ *Davenport v. Sovil*, 6 O. S. 459; *White v. Denman*, 1 O. S. 110; *Insurance Co. v. Williams*, 39 O. S. 584.

⁵ *Gardner v. Moore*, 75 Ala. 394-9; *Conner v. Armstrong*, 86 Ala. 262.

⁶ *Popejoy v. Miller*, 32 N. E. Rep. 718; 183 Ind. 19. In this case issue was joined by general denial in an action for the recovery of property, and trial was had to the court, and a special finding of facts. Where the

final relief sought entitles the plaintiff to a jury trial, it would seem from the fact that reformation is purely a provisional remedy, and entirely within the province of equity, that the right thereto should first be established by the court.

⁷ *Sheeful v. Murty*, 80 O. S. 50.

⁸ *Buckner v. Mear*, 26 O. S. 514. The proceedings on the legal cause should be stayed until the determination of the equitable cause. *Massie v. Stradford*, 17 O. S. 596. See sec. 586.

⁹ *Ante*, sec. 586.

Sec. 1097. Petition for reformation of deed as to description.—

[*Caption.*]

On the — day of —, 18—, in consideration of the sum of — dollars, plaintiff sold and conveyed unto A. B. the following described premises: [*Here give correct description of premises.*]

That on the — day of —, 18—, plaintiff executed and delivered to the said A. B. a deed of conveyance, thereby intending to convey, and which the parties thereto supposed did convey, the premises hereinbefore described to the said A. B., whereas in fact, by the mutual mistake of both the grantor and the grantee, the description in said deed of conveyance was as follows: [*Here give erroneous description as contained in deed.*]

That before the bringing of this action plaintiff informed the defendant of said mistake and requested him to correct the same, which the defendant failed and neglected to do.

Plaintiff therefore prays that said deed of conveyance may be reformed so as to describe said premises correctly, as first described herein, and for such other and further relief as may be proper in the premises.

NOTE.— Mistake as to description may be corrected as against a grantor and his representatives. *Broadwell v. Phillips*, 80 O. S. 255. The proof must be clear. *Joung v. Weyand*, 14 W. L. B. 143; *Potter v. Potter*, 27 O. S. 84; *Gwyer v. Spaulding*, 38 Neb. 573; 50 N. W. Rep. 681; *Roberts v. Derby*, 23 N. Y. S. 34; *Warwick v. Smith*, 137 Ill. 504. Mutual deeds made by parties at the same time may, for the purpose of determining the intention of the parties, be regarded as a single transaction. *Smith v. Turpin*, 20 O. S. 478. Intention of the parties cannot be made to take the place of a controlling call in a deed, or to contradict the description. *McCafferty v. Conover*, 7 O. S. 99.

Sec. 1098. Reformation — Defenses.— Where a defendant in an action to correct a mistake in a conveyance states in his answer that he made a mistake in the contract of sale, and that the property he intended to sell was that described in the conveyance, and asks to have the contract reformed, this does not constitute a defense unless he also states that there was a mistake upon the part of the plaintiff.¹ A person who has knowledge of a mistake and of the ignorance of the other party but remains silent cannot defeat a reformation upon the ground that the mistake was not mutual.² As a court will not reform an instrument which cannot be enforced, the fact that a deed or contract sought to be reformed cannot be enforced is a good defense.³ Any state of facts which entitles a

¹ *Kreitz v. Frost*, 5 Abb. Pr. (N. S.) 277.

² *Rosell v. Rosell*, 109 Ind. 354.

³ *Olson v. Erickson*, 42 Minn. 440.

person to reformation of an instrument may be regarded as an equitable defense.¹

Sec. 1099. Parties to actions for rescission and cancellation.— The general rule applicable to this class of actions is that all persons whose rights would be affected by the cancellation or rescission of the instrument should be made parties defendant.² In an action to set aside a sheriff's deed the purchaser and not the sheriff is the only proper party.³ All grantees whose title is assailed should be made parties;⁴ but a fraudulent grantor is not a necessary party to an action against his grantees to set aside a conveyance alleged to be in fraud of his creditors;⁵ nor are the creditors or fraudulent grantees who have parted with their interest proper parties.⁶ Nor are a vendor and vendee united in interest, within the meaning of the statutes as to service, but they are necessary parties in an action to set aside and cancel a deed on the ground of fraud.⁷

Sec. 1100. Rescission and cancellation — The petition.— An instrument may be canceled on the ground of mistake, but, unlike the rule in cases of reformation, such cancellation may be made upon the ground that the mistake is that of only one party, when both parties may be placed in their former position.⁸ Where one desires to rescind a contract on account of the fault of the other party, he should give notice of his purpose to rescind;⁹ and if the rescission be sought on the ground of fraud, the plaintiff must offer to rescind promptly upon discovering the same.¹⁰ But where a contract is induced by intoxication no formal rescission is necessary.¹¹ A court may

¹ *East v. Pedon*, 108 Ind. 92.

² *Pomeroy's Code Rem.*, sec. 379.

³ *Draper v. Van Horn*, 15 Ind. 155. And all parties should be made parties to an action to set the same aside. *Clemens v. Elder*, 9 Ia. 272.

⁴ *Audubon Co. v. Emigrant Co.*, 40 Ia. 460; *Mattaer v. Payne*, 15 Fla. 682.

⁵ *Potter v. Phillips*, 44 Ia. 353; *McCutchens v. Figue*, 4 Heisk. 565.

⁶ *Jackman v. Robinson*, 64 Mo. 289.

⁷ *Moore v. Chittenden*, 39 O. S. 563.

⁸ *Benson v. Markoe*, 37 Minn. 30; s. c., 5 Am. St. Rep. 316. A contract

may be rescinded upon discovery of mistake. *Byers v. Chapin*, 28 O. S. 800. A person cannot ask a rescission on the ground of fraud to which he is a party. *Goshen Tp v. Shoemaker*, 12 O. S. 624. A contract for a sale and conveyance induced by a mutual mistake may be rescinded. *Irwin v. Wilson*, 45 O. S. 426, and cases cited. For false representations, see *Mulvey v. King*, 39 O. S. 491.

⁹ *Seeds v. Simpson*, 16 O. S. 321.

¹⁰ *Parmlee v. Adolph*, 28 O. S. 10.

¹¹ *Baird v. Howard*, 51 O. S. 57; 31 W. L. B. 180.

in its discretion refuse to rescind a contract, the specific execution of which it would not decree. Yet where a specific execution would be refused, rescission will be decreed.¹ Where fraud and illegality are relied on for cancellation, the specific acts constituting the same must be stated, as a mere general averment presents no issue;² and it should be stated when the fraud was discovered.³ In an action by a grantor to set aside a deed on the ground of fraud, he must allege ownership in himself. An averment that at the time of the execution of the deed he was seized in fee-simple and the owner of the premises is sufficient.⁴ Although fraud must be conclusively proved by the one alleging it, still it may be inferred from the fact that the grantor was under some disability or influence of the grantee, if the instrument was without valuable consideration.⁵ If relief be sought upon the ground of fraudulent representations, it must be alleged that the injured party relied upon them and was misled,⁶ as a bare allegation that fraudulent representations were made is not sufficient.⁷ Before a person can rescind an instrument he must divest himself of all benefits received, and restore everything to the other party if that be possible.⁸ But this does not apply to a contract founded on an illegal consideration, and void for that reason.⁹

Where a joint purchase is made by several persons, and the vendor procures one of them to fraudulently induce his associates to buy, the remainder may, upon discovering the fraud, have the sale rescinded; and they are not prevented from so

¹ Kirby v. Harrison, 2 O. S. 336, 338; State v. Bon, 6 O. 386; Higham v. Harris, 108 Ind. 246; Walkins v. Collins, 11 O. 81.

² State ex rel. v. Williams, 39 Kan. 517; Pelton v. Bemis, 44 O. S. 51; Ockendon v. Barnes, 43 Ia. 615; Bliss on Code Pldg. 218-234; Pomeroy's Rem. 530.

³ Walker v. Pogue, 2 Colo. App. 149; 29 Pac. Rep. 1017 (1892). See chapter on Fraud. And the whole instrument must be rescinded. Weed v. Page, 7 Wis. 503.

⁴ Buckholz v. Grant, 15 Minn. 406; Horrell v. Manning, 6 Oreg. 413.

⁵ Baugh v. Buckles, 2 O. C. C. 498 (Champaign Co., 1887).

⁶ Horrell v. Manning, 6 Oreg. 413.

⁷ Arnold v. Baker, 6 Neb. 134; Mulvey v. King, 39 O. S. 491.

⁸ Anthony v. Day, 52 How. Pr. 35; Dayton Ins. Co. v. Kelley, 24 O. S. 345; Keck v. Jenney, 1 Clev. Rep. 90; Walker v. Pogue, 2 Colo. App. 149; 29 Pac. Rep. 1017; State ex rel. v. Williams, 39 Kan. 517; Yeoman v. Lasley, 40 O. S. 190. See Higby v. Whittaker, 8 O. 201; Bebout v. Bodle, 38 O. S. 500.

⁹ Insurance Co. v. Hull, 51 O. S. 270.

doing by the fact that they have repurchased a portion of the premises sold for the purpose of tendering a conveyance.¹ In an action by a vendor to rescind a contract for the sale of real estate on account of failure to pay the purchase-money, the petition must contain an averment that a valid deed has been tendered to the vendee, conveying to him all the land according to the contract.² A petition to set aside a deed made by a person of unsound mind must allege a disaffirmance of the deed by the plaintiff before the action is commenced, as such a contract is only voidable.³ If an infant seeks to avoid or cancel a deed because of his infancy, he must show affirmatively in his petition that he attained the age of majority before the commencement of the action.⁴ An assured may seek a rescission of a contract of insurance and recovery of premiums paid where the company has wrongfully declared the policy forfeited.⁵ And so may a lessee ask a rescission of a contract for the sale of the good will of the lessor, notwithstanding the lessee has been defeated in an action to enjoin the violation of the same.⁶ But a plaintiff who has been guilty of negligence cannot have a rescission.⁷

Sec. 1101. Petition to cancel deed made by illiterate person.—

That on the — day of —, 18—, plaintiff was seized in fee-simple of the following described real estate, situate in the county of —, and state of Ohio: [*Describe it.*]

That the defendant on said day fraudulently procured and induced plaintiff to execute to him a warranty deed of said premises, conveying the same to him in fee-simple, by fraudulently and falsely representing to plaintiff that said deed was a mere lease of said premises to him for the term of — years.

That plaintiff was at the time illiterate and could neither read nor write, as the defendant well knew, and believed and relied upon said false and fraudulent statements of the defendant, and was thereby induced to execute said deed, believing the same to be a lease as aforesaid, and for no other purpose.

That plaintiff has received no consideration for said convey-

¹ Yeoman v. Lasley, 40 O. S. 190.

v. Berryman, 128 Ind. 451; 24 N. E.

² Frink v. Thomas, 20 Oreg. 265; Rep. 249; Fay v. Burditt, 81 Ind. 433.

25 Pac. Rep. 717 (1891). See Higby v. Whittaker, 8 O. 201; Hough v. Hunt, 2 O. 495.

⁴ Irvin v. Irvin, 5 Minn. 61.

⁵ Insurance Co. v. Bernard, 23 O. S. 459.

³ Ashmead v. Reynolds, 127 Ind. 441; 26 N. E. Rep. 80 (1891); Boyer

⁶ Gottschalk v. Witter, 25 O. S. 76.

⁷ Crist v. Dice, 18 O. S. 536.

ance [*or*, defendant paid plaintiff the sum of — dollars in consideration of the execution of said instrument, which plaintiff accepted as part payment for said lease, and for no other purpose].

That plaintiff did not discover that said instrument was a deed until the — day of —, 18—, when he [tendered to the defendant said sum of — dollars and] demanded a return and cancellation of the same, which was refused.

Wherefore plaintiff demands that said deed be ordered to be delivered up and canceled, and for all other proper relief.

Sec. 1102. Petition by grantee to rescind sale for want of title in grantor.—

That on the — day of —, 18—, in consideration of the sum of \$—, plaintiff purchased from the defendant the following described real estate, situated in the county of — and state of Ohio, to wit: [*Describe it.*] Plaintiff paid said defendant the sum of — dollars, and executed his notes for the remainder of said purchase-money for — dollars, payable respectively in one, two and three years, with interest at — per cent. per annum from date.

Defendant falsely and fraudulently represented to plaintiff that he was the owner in fee-simple of said real estate, and, in consideration of the payment of said — dollars and giving of said notes, agreed in writing that he would, on the — day of —, 18—, by a good and sufficient warranty deed, convey said real estate in fee-simple to plaintiff.

Plaintiff, having no knowledge of any defect, or want of title in the defendant, on the — day of —, 18—, entered into possession of said real estate under said contract, and held possession of the same until the — day of —, 18—.

On the — day of —, 18—, plaintiff demanded of the defendant a conveyance of said real estate, which he refused.

That the defendant had no title to said real estate at the time of making said contract of purchase aforesaid and does not now own said premises.

That none of plaintiff's notes to the defendant are due, and on the — day of —, 18—, plaintiff first discovered that the defendant was not the owner [in fee-simple] of said real estate, and immediately [*or*, on the — day of —, 18—], tendered to the defendant the rents and profits of said real estate for the time he had so occupied the same, and demanded a return and cancellation of said notes and the payment of said sum of — dollars so paid in cash, but defendant refused to pay the same or to return or cancel said notes.

Wherefore plaintiff asks that the defendant be ordered to return said notes to him; that they be declared canceled; that he have judgment for the said sum of — dollars, so paid the defendant, and interest thereon from the date of its payment, and for all other proper relief.

Sec. 1103. Petition to rescind contract for sale of land.—

That on the — day of —, 18—, the plaintiff was the owner in fee of the following described premises, viz.: [*describe premises*], situated in the county of —, in the state of —.

That on said day the defendant E. F. applied to the plaintiff and stated that he was about to purchase lands in the vicinity of the above-described premises and desired to purchase the same, and thereupon procured from the plaintiff the following option for the purchase of said premises, to wit: [*Or plead substance and negative terms.*]

That said defendant did not pay the money as provided in said proposition, nor comply with any of its conditions, and on or about the — day of —, 18—, the plaintiff and defendant by mutual consent abandoned said proposition.

That afterward, and on or about the — day of —, 18—, the plaintiff contracted to sell an undivided half of said premises to one G. H. for the sum of \$—, lands in that vicinity having become greatly enhanced in value by reason of the construction of a railroad through that portion of the country, and the location of a depot on said land.

That on the — day of —, 18—, and after the construction of said railroad and the location of said depot on said land, said E. F. applied to the plaintiff and offered to pay him \$—, and to give security for the deferred payments, which the plaintiff declined to receive upon the ground of delay, and that the formal proposition had been abandoned.

That thereafter, and on or about the — day of —, 18—, said defendant E. F., in order to defraud the plaintiff, wrote under said proposal these words: "Proposal accepted this — day of —, 18—, E. F.," and on the same day assigned the same to I. J. and K. L., who now claim that the same is a valid contract against the plaintiff.

That the plaintiff is in possession of said premises, and said proposal and the acceptance written thereunder constitute a cloud upon plaintiff's title to the same and greatly depreciate the value thereof.

Plaintiff therefore prays that the said proposal and acceptance be declared null and void, and held for naught, and that the cloud thereby cast on plaintiff's title to the said premises may be removed, and for such other relief as justice and equity may require.

Sec. 1104. Petition by vendee against vendor to set aside an agreement relating to lands on the ground of defect in title — (Fraud).—

[*Caption.*]

[*Formal parts.*] That on or about the — day of —, 18—, a certain C. D., of — county, Ohio, pretending to be

seized in fee-simple of a tract of land in said county, and to have the right and title to convey an absolute and unincumbered estate therein, agreed in writing with plaintiff to sell him the aforesaid land for the sum of — dollars, to be paid unto the said C. D. by plaintiff as soon as the said C. D. should execute and tender unto him a deed of conveyance for said land, with the usual covenants.

That plaintiff caused an examination to be made of the title of said C. D. to said land, and has discovered, among other things, that the said C. D. derives his title to said land from one E. F. under a deed of conveyance dated the — day of —, 18—, and recorded in the recorder's office of said county; and plaintiff is advised that the said deed is inoperative as a legal conveyance of title to said land, because of certain defects in the certificate of acknowledgment thereof, as will be apparent from the inspection thereof, in this, to wit: [*State defects.*]

That the said C. D. cannot convey unto plaintiff a clear, unincumbered estate in fee-simple to all the land mentioned in the aforesaid agreement, and plaintiff should not therefore be required to carry out said agreement, and pay to the said C. D. the purchase-money contracted to be paid therefor, but that, on the contrary, plaintiff insists that the agreement aforesaid be rescinded, unless the said C. D. can show to this court that he has a clear and unincumbered estate in fee in said land, and is able to convey the same unto plaintiff as stipulated by the aforesaid agreement.

Wherefore the plaintiff prays that in case this court shall be of opinion that the said C. D. can convey unto plaintiff a clear and unincumbered estate in fee-simple in the whole of said land, he may be decreed to make conveyance thereof with all the usual covenants, upon payment in full of the purchase-money by plaintiff, as stipulated by said agreement; or, in case it shall appear to this court that the said C. D. cannot make a conveyance of said land as aforesaid, then that the said agreement may be rescinded and set aside; and plaintiff prays that he may have such other and further relief as his case may require.

Sec. 1105. Petition to annul stock subscription.—

That on the — day of —, 18—, the defendants falsely and fraudulently represented that they had organized a company under the name of the U. P. R. Company, of which defendant A. B. was president, and the defendant S. was secretary. That said corporation owned the right to sell in certain specified counties a patent-right for [*state what*], which was purchased cheap and was very valuable. That A. B., C. D., etc., men well known to plaintiff as men of character and pecuniary responsibility, had taken shares, and given their notes therefor.

That plaintiff, believing and relying upon said fraudulent representations, was induced thereby to and did subscribe for — shares of the capital stock of said company, of the par value of — dollars, in payment of which plaintiff on said day gave defendants his promissory note in the sum of — dollars, payable — days thereafter.

That said representations were wholly false, in this: [*State falsity of representations.*]

That plaintiff was ignorant of said facts at the time of subscribing for said stock, and did not discover said fraud until the — day of —, 18—.

Plaintiff alleges that said stock is of no value whatever, and that immediately upon discovering the fraud that had been practiced upon him, plaintiff notified defendants of his election to rescind said subscription, and tendered to them a surrender of said stock, and demanded a return and cancellation of his said note, but defendants refused to receive said stock or return said note.

Plaintiff therefore asks that his said subscription to the capital stock of said company may be canceled, and that the note so given by him therefor may be canceled and held for naught.

NOTE.—Taken from *Miller v. Barber*, 66 N. Y. 558; *Collins v. Townsend*, 58 Cal. 613; *Phelps v. Whittaker*, 87 Mich. 77.

Sec. 1106. Answer that contract was rescinded.—

That after the contract set forth in the complaint was made, and before any breach thereof, it was expressly agreed between the plaintiff and the defendant that said contract should be rescinded and abandoned, and it was therefore rescinded and abandoned accordingly.

CHAPTER 78.

REVIVOR OF ACTIONS AND JUDGMENTS.

Sec. 1107. What actions may be re- vived.	Sec. 1110. Affidavit for service.
1108. In whose name revived.	1111. Form of publication.
1109. Revivor, how effected.	1112. Revivor of judgment.

Sec. 1107. What actions may be revived.—An action for libel, slander, malicious prosecution, nuisance, or against a justice for official misconduct, abates by the death of either party. All other actions or proceedings, such as survived at common law and by statute, may be revived and proceed in the name of the personal representative.¹ A pending action to recover damages for injuries caused by negligence does not abate by the death of the plaintiff.² The court may, notwithstanding the death of one of several plaintiffs and defendants in an action which does not survive, try the cause between the remaining parties, although the judgment can not prejudice one who is not a party.³ And upon the death of a party to an action revivable in favor of his representative or successor, the same may proceed in the name of such personal representative or successor.⁴ Where during the pendency of an action against one holding property in the capacity of trustee such trustee dies, it is necessary that the same be revived in the name of his successor before a decree can be taken;⁵ and so in the case of an executor.⁶ But if a party dies after a levy has been made, it is not necessary that the action be revived before proceeding to sell.⁷ A claim upon which suit has been commenced against a person who dies before its termination need not be presented to his personal representative before revivor of the action may be had.⁸

¹ O. Code, secs. 4975, 5144; Whitaker's Ohio Civ. Code (4th Rev.ed.), p. 8; 90 O. L. 140. Action for dower does not abate. R. S., sec. 5145.

² Ohio & P. C. Co. v. Smith, 53 O. S. 313.

³ O. Code, sec. 5147.

⁴ O. Code, sec. 5148.

⁵ Mannix v. Elder, 1 O. C. C. 59; Greer v. Howard, 41 O. S. 591.

⁶ Bishop v. Stoddard, 1 Clev. Rep.

⁷ Cist v. Beresford, 13 W. L. B. 363.

⁸ Musser v. Chase, 29 O. S. 577.

Sec. 1108. In whose name revived.— If the plaintiff in an action dies, the action may be revived in the name of his personal representative or heirs and devisees, to whomsoever his rights in the action passed.¹ A proceeding for the condemnation of lands must be revived in the names of the heirs or devisees.² If a defendant to an action in which the right survives to his personal representative dies, it shall be revived against him; and if to his heirs and devisees, then it shall be revived against them.³ An action for the recovery of real property is revived against the heirs or devisees of a defendant.⁴ A revivor against a representative or successor of a defendant must be made within a year from the time it could have been first made;⁵ and it cannot be revived in the name of a personal representative or successor of a plaintiff, as a matter of right, after the expiration of one year from the time the order might have first been made. But it may be made sooner if consented to by the defendant.⁶ If the defendant be dead, the order of revivor may be within a year.⁷ The method of reviving an action provided for under the code must be in accordance with the conditions and within the limitations therein prescribed. But the summary method provided by the code is not conclusive, as the court may, in the exercise of its discretion, allow an action to proceed against the representative or successor of a deceased party, either by order or the allowance of supplemental pleadings and service of process. Reasonable diligence, however, is required.⁸ The action may be stricken from the docket when it is made to appear by affidavit that the parties have been dead so long that it cannot be revived without consent;⁹ and it may upon ten days' notice, at any term succeeding the death of the plaintiff, be stricken from the docket unless it is forthwith revived.¹⁰

Sec. 1109. Revivor, how effected.— The representative or successor in interest should file a motion to become a party to the action, or by a supplemental pleading allege the death,

¹ O. Code, sec. 5154.

⁷ O. Code, sec. 5158.

² *Railway Co. v. Bohm*, 29 O. S. 638.

⁸ *Carter v. Jennings*, 24 O. S. 182 (1878); *Dungin v. Brashears*, 10 Am. Law Rec. 58; *Black v. Hill*, 29 O. S. 86.

³ O. Code, sec. 5155.

⁴ O. Code, sec. 5156.

⁵ O. Code, sec. 5157.

⁶ O. Code, sec. 5158.

⁹ O. Code, sec. 5159.

¹⁰ O. Code, sec. 5160.

naming the representative or successor in interest upon whom service may be had. The order may be made by a court or judge in vacation,¹ and rests entirely within the discretion of the court, not being subject to any limitation.² A representative of a deceased defendant in error may be made a party to a proceeding in error and the action revived in his name, even though a year has intervened between the death and the time of making the application.³ A judgment of reversal on error after error assigned has been held good though one of the plaintiffs is deceased and his legal representative has not been made a party.⁴ A revivor may also be had by a conditional order,⁵ which must state the name and capacity of the representative or successor;⁶ or it may be made on motion of the adverse party, or of the representative of the deceased party.⁷ Unless the order be made by consent, it must be served on the opposite party in the same manner as a summons.⁸ If the parties against whom revivor is sought are non-residents, or have left the state to avoid service, or conceal themselves, or their names are unknown, service may be made upon them by publication.⁹ A foreign administrator cannot be compelled to appear.¹⁰

Sec. 1110. Affidavit for service by publication.—

[*Caption and formal parts.*]

A. V., the plaintiff in the above-entitled cause, being duly sworn, says that service of the order of revivor cannot be made on the personal representative of the said C. D., deceased, for the reason that said personal representative is a non-resident of the state [*or state any of the other statutory grounds*].

NOTE.—For forms of conditional order, order of revivor, etc., see 1 Bates' P., P. & F., p. 220. The order is usually secured by oral suggestion to the court, and by placing an entry on the journal.

Sec. 1111. Form of publication.—

A. B., who resides at —, in the state of —, who is administrator of the estate of C. D., deceased, formerly of —, will take notice that a conditional order of revivor of the

¹ O. Code, sec. 5149.

⁵ O. Code, sec. 5150.

² Black v. Hill, 29 O. S. 86; Carter v. Jennings, 24 O. S. 182; Getty v. Spaulding, 58 N. Y. 636.

⁶ O. Code, sec. 5151.

⁷ O. Code, sec. 5151.

⁸ Hamilton v. Sala, 1 W. L. M. 403.

³ Pavey v. Pavey, 80 O. S. 600; Foresman v. Haag, 37 O. S. 143.

⁹ O. Code, secs. 5043-5048.

¹⁰ Lampton v. Nichols, 2 C. S. C. R.

⁴ Cole v. Alexander, 2 O. C. C. L. 55.

above-entitled cause of action has been made by the — court of — county, which said cause of action is now pending and numbered — on the dockets of said courts, and that the object and prayer of said cause is [*state what*], and that unless he shows cause to the contrary on or before the — day of —, 18—, the said action will stand revived against him.

Sec. 1112. Revivor of judgment.— A judgment which has become dormant may be revived in the same manner as are actions before judgment. If the adverse party be a non-resident, either one may make an affidavit to that effect, showing the amount due upon the judgment, and service may be made by publication. Unless sufficient cause be shown to the contrary, the judgment will stand revived for the amount found due by the court.¹ If either or both parties die after judgment rendered before satisfaction, their representatives may be made parties and the same revived by an action brought for that purpose; or they may be made parties in the same manner as in the revival of an action before judgment, and judgment may be rendered against them accordingly. If either party die after verdict rendered on error, and before the judgment is carried into execution by the lower court, the same may be revived in the lower court.² If the plaintiff dies after personal judgment has been rendered, or a decree for the specific sale of real estate is made, the action must be revived before a levy or sale can be made thereunder.³ But unless such a judgment becomes a lien during the life-time of the debtor, it cannot be enforced against the heirs.⁴ But if the debtor dies after a levy has been made, the sale may proceed without making the personal representative a party.⁵ A surety may have a judgment revived in his own name and enforce it against the principal.⁶ A plaintiff in foreclosure proceedings cannot, in reviving a judgment, amend his petition so as to include a cause of action not originally incorporated in his petition and have the same enforced against other liens.⁷ A judgment for

¹ O. Code, sec. 5367; 91 O. L. 163; *Moore v. Ogden*, 35 O. S. 430; *Beau-Whittaker's Ohio Civ. Code* (4th Rev. ed.), p. 278. See *ante*, sec. 1107. As to limitations, see sec. 5367.

² O. Code, sec. 5369.

³ *Cist v. Beresford*, 1 O. C. C. 32; 155; *Neal v. Nash*, 23 O. S. 483.

⁷ *Fort v. Litner*, 31 O. S. 215.

mont v. Herrick, 24 O. S. 445.

⁴ *Miller v. Taylor*, 29 O. S. 257.

⁵ *Bigelow v. Renker*, 25 O. S. 542.

⁶ *Peters v. McWilliams*, 36 O. S.

alimony may be revived against the personal representative of a deceased defendant for the enforcement of unpaid instalments due at his death.¹ And members of a partnership against which a judgment has been rendered by its firm name may be made parties to the judgment by action.² A proceeding to revive a judgment is not a new action, but is merely an additional step in the same action, in which service must be made, however, as though it were an original action.³ The application for revivor should show upon its face that sufficient time has elapsed so that the judgment has become dormant.⁴ A defendant against whom a revivor of judgment is sought cannot make any defense thereto which he could have made to the original action. But anything which has occurred subsequent to the rendition of the judgment may be set up by him, such as payment, or anything under the original judgment which releases him from his liability. He may also show that he sustained the relation of surety.⁵ An error, however, committed in the rendition of the judgment cannot be corrected.⁶

Sec. 1112a. Lien of judgment revived.—The lien of the judgment for the amount due is revived upon revivor of a dormant judgment, and operates from the time of the entry of the conditional order or the filing of the petition to revive.⁷ And when a dormant judgment is revived it does not by virtue of its revivor, become a lien on lands acquired by the debtor after its original recovery unless a levy is made either before it became dormant or after its revivor. When made after revivor the lien dates from the time the land is seized in execution, and not from the date of revivor.⁸

Sec. 1112b. Limitation to revivor of judgment.—An action to revive a judgment must be brought within twenty-one years from the time it became dormant, unless the party entitled to bring it was under some disability named in the statute. The disabilities are that the party was a minor, of unsound mind, or imprisoned.⁹ Non-residence of the defendant in the county or state, or his absence therefrom, and coverture are disabilities included in this act.¹⁰

¹ *McCowan v. Weiskittle*, 4 W.L.B. 303.

² O. Code, sec. 5370.

³ *Misner v. Misner*, 41 O. S. 678.

⁴ *Hough v. Norton*, 9 O. 45.

⁵ *Nestlerode v. Foster*, 8. O. C.C. 70.

⁶ *Burdell v. Reeder*, 2 C. S. C. R. 94.

⁷ R. S., sec. 5367.

⁸ *Smith v. Hogg*, 52 O. S. 527.

⁹ R. S., sec. 5368.

¹⁰ *Bartol v. Eckert*, 50 O. S. 31.

CHAPTER 79.

SALES.

Sec. 1112. Action to recover price.	Sec. 1118. Petition by creditors to set
1114. Petition to recover purchase-money.	aside sale by assignee as fraudulently made.
1115. Action by vendor against vendee.	1119. Action by vendee against vendor.
1116. Petition for refusal to receive and pay for goods.	1120. Petition for non-delivery of goods sold.
1117. Petition for breach of contract of sale upon refusal to execute note.	1121. Petition for goods delivered to third party.
	1122. Sales — Defenses.

Sec. 1113. Action to recover price.— In an action for the recovery of the price of goods sold and delivered, the ordinary form of count *indebitatus assumpsit* is sufficient.¹ Recovery may be had by the owner even though payment has been made by the purchaser to a broker who made the sale, but without authority and without possession.² And even though a sale is made through an agent to whom credit was given, the principal may be sued for the purchase price if discovered.³ The delivery of wheat to a warehouseman is, in the absence of contract to the contrary, generally treated as a sale rather than a bailment, so that an action for the value thereof may be sustained.⁴ A vendor may elect to rescind a contract of sale and prosecute an action for the recovery of the specific property, in which case he cannot afterwards sue for the price.⁵ It is not necessary, in an action for the price of goods sold and delivered, that the petition should contain any allegation as to the kind or particular quality of the property.⁶

¹ McGee v. Kast, 49 Cal. 141; Morse v. Sherman, 106 Mass. 430.

² Crosby v. Hill, 89 O. S. 100.

³ Lamb v. Thompson, 81 Neb. 448; Merrill v. Kenyon, 48 Conn. 814; Barker v. Garvey, 88 Ill. 184; Story on Agency, sec. 446, and cases cited.

⁴ James v. Plank, 48 O. S. 255.

⁵ Thompson v. Fuller, 16 N. Y. S. 486. As to right of election, see

Crossman v. Rubber Co., 127 N. Y. 84.

⁶ Neal v. Shewalter, 5 Ind. App. 147; 81 N. E. Rep. 848 (1892).

Sec. 1114. Petition to recover purchase-money.—

Plaintiff states that on the — day of —, 18—, he sold and delivered to the defendant the following property, to wit: [*state what property*], for the sum of \$—, the same to be paid within sixty days from the date of sale. That said sixty days has long since elapsed, and that defendant has wholly failed and neglected to pay said sum, and there is therefore due and owing plaintiff from defendant said sum of \$—, with interest from the — day of —, 18—, for which he asks judgment.

Sec. 1115. Action by vendor against vendee.—If a purchaser refuses to receive and pay for goods sold, the vendor may elect either to retain the property and recover the difference between the contract and the actual price, or he may sue for and recover the contract price, in which event he must deliver the property when demanded upon the receipt of payment.¹ Before a person can recover for a breach of sale he must allege and show that he is not only able to perform his part of the contract,² but also his readiness and willingness to perform as well.³ If the purchaser cancels a sale before delivery he is liable to an action in damages.⁴ And where it is provided that delivery shall be made at a certain time and place, and the vendee notifies the vendor that he will not receive the same, an action may be commenced at once without tender;⁵ although the fact that a purchaser gives notice that he will not be able to pay for goods will not authorize an action before the term of credit expires.⁶ And where property is to be delivered as ordered, and, after the purchaser has received a portion only, he refuses to receive any more, recovery may be had against him without tender of the balance.⁷ If the goods delivered are of a different or inferior quality from that stipulated in the contract of sale, a vendee may refuse to accept the same.⁸ If the contract of sale provides

¹ *Hayden v. Demets*, 58 N. Y. 426.
The amount recoverable is the contract price and interest from the time the money should have been paid. *Shawhan v. Van Nest*, 25 O. S. 490.
Or the difference between the contract price and its market value. *Cullen v. Bynn*, 37 O. S. 236; *Nixon v. Nixon*, 21 O. S. 114.

² *Diem v. Koblitz*, 49 O. S. 41.

³ *Hill v. Chipman*, 59 Wis. 211.

⁴ *Sonka v. Chatham*, 21 S. W. Rep. 948 (Tex., 1893).

⁵ *Tullos v. Rodgers*, 10 W. L. B. 181 (Sup. Ct. Commission).

⁶ *Kellar v. Strasburger*, 90 N. Y. 379.

⁷ *Todd v. Gamble*, 21 N. Y. S. 739.

⁸ *Walker v. Davis*, 65 N. H. 170.

that the purchaser shall give a note for the price, a right of action arises upon a refusal to execute a note as for a breach of contract.¹ And if notes are given, but are not paid, recovery may be had for a breach of the contract.² If the terms of sale are partly cash and partly notes, a demand for the cash or execution of the notes converts it into a money demand, upon which the vendor may have an action.³ Where the goods are fraudulently obtained, the vendor may rescind a contract and recover the value in tort.⁴

Sec. 1116. Petition for refusal to receive and pay for goods sold.—

That on the — day of —, 18—, the defendant purchased from the plaintiff the goods, wares and merchandise, an account of which is hereto attached, marked "Exhibit A," for an agreed price of \$—, which were to be delivered by plaintiff to defendant on the — day of —, 18—.

That upon said — day of —, 18—, according to said contract of sale, plaintiff tendered said goods to defendant, and demanded payment therefor, which was refused, and said defendant still refuses to either receive or pay for said goods according to contract. That plaintiff is willing and ready to deliver said goods to defendant at any time. That there is therefore due from the defendant to the plaintiff thereon the sum of \$—, for which he asks judgment.

NOTE.— This action may be brought upon refusal to receive the goods without actual tender of the same. *Tullos v. Rodgers*, 11 W. L. B. 181. The account falls within *ante*, sec. 57.

Sec. 1117. Petition for breach of contract of sale upon refusal to execute note.—

That on the — day of —, 18—, the plaintiff sold and delivered to the defendant C. S. the following personal property, to wit: a half interest [*description of property*], which the plaintiff then had, and for which the defendant agreed to pay to said plaintiff the sum of — dollars by then executing and delivering to plaintiff his promissory note for the sum of — dollars, to be due and payable in — days from the said — day of —, 18—, and to bear interest at the rate of — per cent. per annum, which said note the said defendant has wholly failed and refused to execute and deliver to plaintiff according to the terms of his contract, although demand therefor has been made upon him.

¹ *Stephenson v. Repp*, 47 O. S. 551; ² *Hoover v. Cary*, 58 N. W. Rep. 415 (Iowa, 1892).
Young v. Dalton, 88 Tex. 497.

³ *Kokomo, etc. Co. v. Inman*, 184 N. Y. 92. ⁴ *Dellone v. Hull*, 47 Md. 112.

Plaintiff says that by reason of the premises there is now due and payable from the defendant to plaintiff the sum of — dollars, with interest from —, 18—, and for which plaintiff asks judgment.

NOTE.—From *Stevenson v. Repp*, 47 O. S. 551, where it was held that action could be maintained without waiting for the expiration of the time of credit.

Sec. 1118. Petition by creditors to set aside sale by assignee as fraudulently made.—

[Caption and averment of appointment of assignees.]

The plaintiffs and others are creditors of the said The J. F. S. Co., and as such have duly proved their respective claims by presenting the same duly authenticated to the said assignees for allowance within the time prescribed by law. And their said several claims have been duly allowed by said assignees as valid claims against said company in the matter of said assignment. Said J. A. S.'s claim amounts to about — dollars; said C. A.'s claim amounts to about — dollars, etc.

Said several claims were all created prior to the date of the assignment of said company, and have ever since remained due and unpaid except the dividends thereon hereinafter mentioned.

There is a very large number of creditors of The J. F. S. Co. whose claims amount to from — dollars to — dollars each, and the total indebtedness of said corporation is not less than — dollars, on which dividends have been paid by said assignees, but said dividends have aggregated less than — cents on the dollar, exclusive of interest.

Plaintiffs have been informed and believe, and they so aver the fact to be, that to pay said dividends all the assets of said corporation have been long since exhausted.

These plaintiffs have an interest in common with all other creditors of said corporation in the subject-matter of this suit. Said other creditors are very numerous, so much so that it is impracticable to bring them all before the court on account of their great number. Therefore, these plaintiffs sue for the benefit of themselves and each and all of said creditors. In —, 18—, the exact date the plaintiffs cannot state, the said A. C. V. and C. C., acting as assignees of said company and for the purpose of closing out by sale the remaining assets of said corporation, so assigned, advertised for sale at public vendue, in the manner prescribed by law, the following real estate of said corporation (said real estate having been previously appraised according to the statute at \$—), viz.: *[Description.]*

And said assignees also advertised for sale, at public vendue, at the same time, to wit, on —, 18—, a large amount of personal property of said corporation, so assigned to them,

tools, etc., which have been previously appraised according to the statute at \$——.

Prior to the date on which said real estate and personal property was to be sold as aforesaid, and without the knowledge of these plaintiffs, or any of them, or of any of said creditors of The J. F. S. Company, the defendant J. F. S., with the deliberate intent to deceive, mislead and defraud said creditors, including these plaintiffs, out of a large part of the value of said real estate and personal property so about to be sold, and well knowing that one A. C. B., and other persons acting with him (but the names of said other persons are to this plaintiff unknown), were to be competitors and bidders at said public sale, and with the intent to prevent competition at said sale, entered into a secret contract in writing with said A. C. B. (who would have bid at least —— dollars for said real estate), and in said writing stipulated and agreed, among other things, that if said B. would not at public or private sale compete for the purchase of said real estate, and if said J. F. S. succeeded in obtaining the same, that after said sale was made and confirmed to him (the said S.), he, in consideration therefor, would let the said A. C. B. have the sum of —— dollars for one year without interest, and would pay said sum of money on the day of said confirmation.

On the day advertised for the sale of said property, but prior to the hour fixed therefor, said J. F. S., in order to deceive and defraud said creditors and to prevent fair and open competition in said sale, entered into a further agreement with said B., who was there present at the place designated in said advertisement for said sale, as follows: [*State what.*] Said B. accepted said offer, and joined in said agreement, and thereupon, when said sale was opened by said assignees and bidders were called for, said B. made no bid except a nominal one, at the suggestion of said J. F. S., in order to have the appearance of two bidders. And said real estate was then and there struck off to said S., at said public sale, for the sum of \$——, there being no other bid therefor; and the said probate court of said county, in entire ignorance of said contract and collusion, afterward on ——, 18——, confirmed said sale. Said A. C. B. intended in good faith to bid on said property, and expected to bid for said real estate at said public sale as much as thirty thousand dollars, and would have bid and paid said sum therefor but for the agreements above stated between himself and the said S. Said real estate was then well worth the sum of —— dollars and more, and said defendant, S., well knew that fact at the time he entered into said contract with said A. C. B.

By reason of said fraudulent contract resorted to by said J. F. S., he, the said S., was enabled in fraud of the rights of said creditors to bid in said real estate for the sum of —— dol-

lars, thus defrauding said creditors and these plaintiffs out of more than — dollars.

The matter of said bargain and sale was conducted so secretly and ingeniously that neither the plaintiffs nor any of said other creditors nor said assignees knew anything about said fraud until long after the confirmation of said sale, to wit, on or about —, 18—.

And because of the ignorance on the part of these plaintiffs and of said other creditors of said fraud on the part of said J. F. S., and because of the probate court's ignorance thereof, said S. was enabled to secure, and did secure, the confirmation of said sale as above stated, and thereby, at that date, obtained possession of said property. If said real estate were again offered, said property would readily bring more than twice the sum paid by said S., exclusive of the additions thereto made by him subsequent to said sale.

The defendant, A. C. V., assignee, as above stated, although informed of the fraud on the part of the said J. F. S., as above set forth, some time prior to the commencement of this suit, neglected and refused, and has ever since neglected and refused, to bring suit against said S., based upon the said fraud and for the relief of the creditors of said insolvent estate from the loss and damage occasioned them by said fraud.

The plaintiffs are willing and now offer to pay into court such sum as the court may find said purchaser entitled to, to restore him to his former condition, as a condition of setting said sale and conveyance aside.

The plaintiffs therefore pray that said sale of said real estate may be set aside as fraudulent and void, and that the same may be resold by the court according to law, and that the plaintiffs and all the creditors of said corporation may be restored to all things that they have lost by reason of said fraudulent sale, and that the court may order such distribution of the proceeds of the sale herein prayed for as may be equitable and just. If, however, it should be held by the court that plaintiffs are not entitled to the relief above prayed for, then they ask that an account may be taken of the amount of loss to them and the other said creditors of the J. F. S. Company, sustained by reason of the said fraud on the part of said S., and that the defendant, S., pay over said sum with interest from the time of said fraudulent sale to the said assignee or some other suitable party appointed by the court for that purpose. And the plaintiffs pray for such other and further order and decree in the premises as law and equity can grant.

W. W. B.,

J. A. K. and

S. & M.,

Attorneys for Plaintiffs.

NOTE.— Taken from *Saxton v. Seiberling*, 48 O. S. 554, where it was held that creditors may, upon the refusal of the assignee, maintain an action to

set aside a sale and a conveyance to a fraudulent purchaser in the court of common pleas. The petition must contain an offer to restore the purchaser to his former condition.

Sec. 1119. Action by vendee against vendor.—A purchaser cannot rescind a contract of sale and sue to recover money advanced, or for a breach, unless he was present and ready to pay the price at the time of delivery;¹ and the fact that the vendor denies the contract and refuses to deliver the property does not relieve him from tender.² But he may have a right of action against the vendor where the articles delivered fall so far short as to warrant a rescission of contract for failure of consideration.³ Where the goods are to be delivered upon demand, no action can be sustained until demand is made and delivery refused.⁴ The vendee may recover on the warranty of the vendor, even though a note for the purchase price has been transferred to a third party and has been merged into judgment but not paid.⁵ Where goods are to be delivered at any time during the year and the vendor gives notice that he will not deliver the same, an action for breach will lie immediately.⁶ A purchaser who has refused to complete the sale cannot recover money paid thereon so long as the vendor is ready and willing to complete his part of the contract.⁷ The measure of damages for breach of a contract of sale is the difference between the contract price and the market price at the time and place of delivery. But where the goods are designed for a special purpose, then recovery may be had for such a portion of the profits as might have been realized from a resale.⁸ Where the vendee refuses to receive property, a subsequent sale is not such a rescission as will enable the vendee to recover from the vendor any money paid.⁹

¹ *Hopkins v. Shull*, 2 W. L. M. 260; 46 Iowa, 235; *Halloway v. Griffith*, 32 Iowa, 409; *Burtis v. Thompson*, 42 N. Y. 246.

² *Mowry v. Kirk*, 19 O. S. 375.

³ *Creighton v. Comstock*, 27 O. S. 548.

⁴ *Smith v. Cohen*, 5 O. C. C. 45.

⁵ *Volland v. Baker*, 32 Neb. 391.

⁶ *Goyert v. Stoner*, 11 W. L. B. 53, and cases cited; *McCormick v. Basil*,

⁷ *Walter v. Reed*, 34 Neb. 544-53, and cases cited.

⁸ *Stewart v. Power*, 12 Kan. 596; *Sleuter v. Wallbaum*, 45 Ill. 43.

⁹ *Beasley v. Lovell*, 2 W. L. M. 551. See *Ashbrook v. Hite*, 9 O. S. 357.

Sec. 1120. Petition for damages for non-delivery of goods sold.—

That on the — day of —, 18—, plaintiff purchased from defendant the following goods: [*describe goods*], for the sum of — dollars, which said goods the said defendant then and there sold to plaintiff, and agreed to deliver to him, at his store in the city of —, on or before the — day of —, 18—, aforesaid, on the following terms, to wit: the payment of — dollars at the time of such sale, and the balance in ten days from the delivery of the said goods.

That plaintiff paid to the said defendant the said sum of — dollars, and is still ready and willing to perform his part of said contract; but the said defendant, although sufficient time has elapsed therefor, has failed to fulfill his part of the said agreement, and does still neglect and refuse to perform the same, to the great damage of this plaintiff, to wit, the sum of — dollars, for which amount he demands judgment against the defendant, with costs of this action.

NOTE.—See form in *Summons v. Green*, 35 O. S. 104.

Sec. 1121. Petition for goods delivered to third party.—

That on the — day of —, 18—, plaintiff sold to the defendant, for the sum of \$—, the goods, wares and merchandise following, to wit: [*state what*], a copy of which account is hereto annexed as an exhibit. Defendant promised to pay for said goods within [*state when*].

That by the express direction of said defendant said goods were delivered to E. F.

There is now due from the defendant to plaintiff upon said account for said goods the sum of \$—, for which sum plaintiff asks judgment against said defendant, etc.

NOTE.—See *ante*, sec. 150, as to credit given to third person. This may be brought as an ordinary account.

Sec. 1122. Sales — Defenses.—In an action for damages for failure to deliver goods, where delivery and payment are concurrent conditions, an offer or readiness to pay must be averred.¹ A defendant may recoup such damages as he has sustained, even though he has used the property and is unable to return it.² And where the damages are less than the amount of the plaintiff's claim, and the only defense set up by the defendants is that the goods were of an inferior quality, judgment may be rendered for the amount admitted to be due.³ Where it is sought to defeat an action for the price

¹ *Chambers v. Frazier*, 29 O. S. 362.

² *Moore v. Woodside*, 26 O. S. 537.

³ *Dayton v. Hooglund*, 39 O. S. 671.

of goods on the ground of fraud, it is not necessary to allege that the goods were returned or an offer made upon discovery of the fraud, when it appears that the goods were delivered by plaintiff without authority of the defendant, and that the contract was signed under false representations.¹ As against a note for the price of goods, a defendant may recoup for the non-delivery of a portion of the goods or for any defects.² Insolvency of the purchaser at the time fixed for the delivery of the goods is a good defense to an action by the vendee for a failure to deliver.³ A general denial to a petition for sale and delivery of goods is held by some authorities to be sufficient to raise an issue of the truth of any of the plaintiff's allegations.⁴ It may be shown under it that the authority of an agent making the purchase was revoked;⁵ or that the defendant dealt with the plaintiff as agent for another whose name was disclosed,⁶ while other courts have held that it does not raise any issue.⁷

¹ *Martindale v. Harris*, 26 O. S. 379.

² *Upton v. Julian*, 7 O. S. 95; *Rugland v. Thompson*, 48 Minn. 539.

³ *Diem v. Koblitz*, 49 O. S. 41.

⁴ *Wheeler v. Billings*, 38 N. Y. 263.

⁵ *Hier v. Grant*, 47 N. Y. 373.

⁶ *Merritt v. Briggs*, 57 N. Y. 651.

⁷ *Lightner v. Menzel*, 35 Cal. 453.

CHAPTER 80.

SEDUCTION.

Sec. 1123. Seduction defined.

1124. Action, when and by whom sustained.

1125. The petition.

1126. Petition by unmarried female for seduction.

1127. Petition for seduction of imbecile daughter.

1128. Petition for seduction of daughter.

Sec. 1129. Seduction — Defenses.

1180. Action for enticing away husband or wife.

1181. Petition by husband against his wife's parents for maliciously enticing away his wife.

1182. Petition for criminal conversation with wife.

Sec. 1123. Seduction defined.— When applied to the conduct of a man towards a female, seduction means the use of influence, promise, art or means on his part by which he induces a woman to surrender her chastity and virtue. Modern lexicographers define it as an act of persuading a woman to surrender her chastity. It implies a betrayal of confidence.¹ There are authorities which hold that, if the facts make a case of rape, an action for seduction may be sustained.²

Sec. 1124. Action, when and by whom sustained.— The action at common law by the father for the seduction of his daughter was based upon the theory that it caused a loss of service, and was maintainable by the father upon that principle, and upon the theory that the relation of master and servant existed between them. If no loss of service was sustained there could be no action. This rule has been

¹ *Marshall v. Taylor*, 97 Cal. 422; 32 Pac. Rep. 867 (1898). The statute against seduction extends to the protection of all females of good repute for chastity under eighteen years. *Bowers v. State*, 29 O. S. 542. It is an injury to both person and character. *Hood v. Sudderth*, 111 N. C. 215. The father and master was obliged to allege and prove the loss of service, however trivial or value-

less, as the foundation for recovery. The courts have always treated the relation of master and servant, and loss of service, as innocent fictions which merely serve to give the court jurisdiction. *Riddle v. McGinnis*, 22 W. Va. 258, 271.

² *Watson v. Watson*, 58 Mich. 168; *Kennedy v. Shea*, 110 Mass. 147; 14 Am. Rep. 584; *Lavery v. Crook*, 52 Wis. 612; 38 Am. Rep. 768.

adopted by some states.¹ He may sustain the action though the daughter be over age if she renders him actual service;² or even though he allows her to retain her earnings while in the service of another.³ In several states the mother is allowed by special provision to sustain the action where the father is dead or has abandoned his wife and family.⁴ Independently of statute, the rule justly prevails in some jurisdictions allowing the mother to sue for seduction of her daughter, especially where she is made dependent upon the former.⁵ The action may also be sustained by the person injured, though a minor, by next friend,⁶ and in her own right when seduced under promise of marriage.⁷ The latter proposition is well founded; and when the petition sets forth a breach of promise to marry containing facts sufficient to make out a case of seduction, it is said that the action may be so treated.⁸ There was no action at common law in favor of the real party injured.⁹

Sec. 1125. The petition.—No particular form is required in the allegations charging seduction, but the essential elements which constitute the offense should be stated. It may be alleged in substance that the defendant induced a female to surrender her chastity and virtue to his embraces, by keeping company, expressing love, or promising to marry her;¹⁰ or it

¹ *Humble v. Shoemaker*, 70 Ia. 223; *Howland v. Carson*, 28 O. S. 629; *Badder v. Keefer*, 91 Mich. 618. A parent may sustain an action against a person who takes a daughter away and seduces her, upon the theory that it is an unwarranted interference with the right of the parent to the services of the daughter. *Lawyer v. Fritcher*, 180 N. Y. 239. To sustain an action by the father, the relation of master and servant must exist. *Furman v. Van Size*, 56 N. Y. 435. See, also, *Graham v. McReynolds*, 90 Tenn. 678; *Davis v. Young*, 90 Tenn. 308; *Hahn v. Cooper*, 84 Wis. 629; 54 N. W. Rep. 1022 (1898). The character and standing of the plaintiff female may be inquired into. *Kepfinger v. Shennick*, W. 108. See 8 *Lawson's R. & R.*, secs. 1113, 1116.

² *Vossell v. Cole*, 10 Mo. 634; *Wert v. Strauss*, 88 N. J. L. 184.

³ *Simpson v. Grayson*, 54 Ark. 404; *Bishop on Non-Cont. Law*, sec. 380.

⁴ *Minn. R. S.*, sec. 4722; *Hill's Ann. Laws Oreg.*, sec. 84; *Ind. R. S.*, sec. 2526; *Iowa Code*, sec. 2555.

⁵ *Furman v. Van Size*, 56 N. Y. 435; 8 *Lawson's R. & R.*, sec. 1114 and cases cited; *Sargent v. Dennison*, 5 Cow. 106; *Gray v. Durland*, 50 Barb. 100; *Dayman v. Moore*, 5 Lana. 454; *Badgley v. Decker*, 44 Barb. 577. This is not the rule in other states. *Vossell v. Cole*, 10 Mo. 634; *Ryan v. Frabick*, 50 Mich. 483.

⁶ *McIlvain v. Emery*, 88 Ind. 298.

⁷ *Hodges v. Bales*, 102 Ind. 494.

⁸ *Hood v. Sudderth*, 111 N. C. 215; *Doe v. Horn*, 1 Ind. 392; 50 *Am. Dec.* 470.

⁹ *Holland v. Carson*, 28 O. S. 625, 629.

¹⁰ *Robinson v. Powers*, 129 Ind. 480.

may be stated that the defendant, under promise of marriage, seduced and had illicit and carnal connection with an unmarried female.¹ The petition will not be objectionable if, among the means employed, it states that the defendant used force, threats, menaces or intimidation to accomplish his purpose;² though it is not necessary to particularly describe the means by which the seduction was accomplished,³ as the ultimate fact only is required; and a statement of the acts made use of to deceive, or an averment that the plaintiff was deceived, will answer. The evidence is not necessary or proper.⁴ Where one of the means employed was a promise to marry, it need not be alleged that the same was relied upon.⁵ In some states the common law has been repudiated, rendering it unnecessary to allege and prove loss of service, though the relation of master and servant must still be alleged.⁶ An allegation by a father that his daughter is a minor, and that he was at the time of the seduction and still is entitled to her service, is sufficient to show the relation of master and servant existing between them.⁷ To warrant a recovery by the father for more than compensatory damages, he should allege that the debauching was the result of seduction;⁸ although an allegation stating generally the loss of services may entitle the father to recover for his mental suffering.⁹ In some jurisdictions it is held that as the action can be sustained only where the daughter is a minor, the petition should allege that fact.¹⁰ But when she lives with him, and he can command her services, he may sustain the action, in which case he should make the appropriate averments to show these facts.¹¹ If the action be by the injured party, under a promise of marriage, the petition need not contain averments of previous chastity.¹²

¹ *McIlvain v. Emery*, 88 Ind. 298.

² *Smith v. Young*, 26 Mo. App. 575.

³ *De Haven v. Helvey*, 126 Ind. 82.

⁴ *Lunt v. Fillbrick*, 59 N. H. 59.

⁵ *Hodges v. Bales*, 102 Ind. 494.

¹⁰ *Dodd v. Focht*, 72 Ia. 579; *Humble v. Shoemaker*, 70 Ia. 228.

⁶ *Brown v. Kingsley*, 38 Ia. 220.

¹¹ *Wert v. Strauss*, 88 N. J. L. 184;

⁸ *Shewalter v. Bergman*, 128 Ind. 155; *Reese v. Cupp*, 59 Ind. 566;

Lipe v. Eisenlerd, 82 N. Y. 229.

Hodges v. Bales, 102 Ind. 494; *McCoy v. Trucks*, 121 Ind. 292.

¹² *Hodges v. Bales*, 102 Ind. 494; *Bell v. Rinker*, 29 Ind. 267. As to relying on promise, see *Hart v. Walker*,

⁹ *Riddle v. McGinnis*, 22 W. Va. 253. See form in this case.

77 Ind. 331; *Reese v. Cupp*, 59 Ind. 566.

⁷ *Clem v. Holmes*, 33 Gratt. 722; 36 Am. Rep. 793.

Sec. 1126. Petition by unmarried female for seduction.—

[*Caption, etc.*]

At the time of the commission of the grievance hereinafter mentioned plaintiff was and is now an unmarried female. That from some time about —, 18—, defendant began paying attentions to plaintiff as suitor and continued so to do until about —, 18—, and thereby gained her confidence, affections and respect. That on or about the — day of —, 18—, he importuned plaintiff to have sexual intercourse with him, and as an inducement for her to submit to his desires and to have sexual intercourse, and on account of her love and affection for him and relying upon his promise of marriage, she was induced to and did have sexual intercourse with him [*state when, etc.*], whereby she became pregnant, and on the — day of —, 18—, was delivered of a child, and suffered great pain and suffering in body and mind, and was compelled to pay out the sum of — dollars for medical attendance during her sickness, and — dollars for nursing and other incidental expenses.

Whereby plaintiff has been damaged in the sum of — dollars, for which she demands judgment.

Sec. 1127. Petition for seduction of imbecile daughter.—

[*Caption.*]

That he is the father of G. H., who is of the age of — years; that his daughter has been from her childhood a person of weak mind, one whose intellect has never fully developed, and because of her weakness has never been manumitted by this plaintiff, and that he has always had the management of her affairs.

On the — day of —, 18—, plaintiff entered into a contract with the defendant by which it was stipulated and agreed that his said daughter should be employed as a domestic in the house of said defendant, this plaintiff then and there warning and exacting of said defendant that he must watch over and care for her on account of her mental weakness, to see that no man should take advantage of her and debauch her, to which defendant consented. That the defendant has accounted to plaintiff for the services of his said daughter.

That during all the times the said G. H. has been in the employ of said defendant she has been subject to the control of plaintiff, and that the plaintiff had the right to reclaim her services at any and all times.

That on or about —, 18—, while his said daughter was in the employ of said defendant, the said defendant, taking advantage of her weak mental condition, and by putting her in fear of him, at divers times from the — day of —, 18—, to —, 18—, carnally knew and had sexual intercourse with and seduced his said daughter, and begot a child upon

her body, to which she gave birth on the — day of —, 18—.

That by reason of the pregnancy of his said daughter, and of her lying in and giving birth to said child, she was wholly disabled and disqualified from performing any services for this plaintiff for many months; that plaintiff was also compelled to expend a large sum of money for her medical attendance and nursing during her said confinement, to wit, the sum of \$——. [*Other special damages.*]

[*Prayer.*]

NOTE.—See *Hahn v. Cooper*, 84 Wis. 629. So long as the daughter remains at home or under the control of the father he may sustain the action. *Id.*; *Lipe v. Eisenlerd*, 32 N. Y. 229.

Sec. 1128. Petition for seduction of daughter.—

That before and at the time of the committing of the grievance hereinafter mentioned, one F. P. was the daughter of the plaintiff, resided with plaintiff, and greatly assisted in the household affairs of himself and family. That on or about the — day of —, 18—, and at divers times since, at —, the said defendant, well knowing the said F. P. to be the daughter of plaintiff, then contriving and unjustly intending to injure the said plaintiff, and to deprive him of the assistance and service of B., the daughter and servant of the said plaintiff, and intending to injure, disgrace, distress and wound the feelings of plaintiff, and deprive him of her service and assistance, and of her society and comfort, and to dishonor the plaintiff and his family, did entice and persuade the said F. R. to have illicit intercourse with him, and the said defendant did then and there debauch, carnally know and seduce the said B., whereby the said B. became pregnant and sick with child, and so remained and continued for a long space of time, to wit, for the space of nine months then next following, at the expiration whereof the said B. was delivered of the child of which she was pregnant as aforesaid; by means of which said several premises she, the said B., for a long space of time, to wit, for the space of two years, became and was unable to do or perform the necessary affairs and business of the said plaintiff, so being her father and master as aforesaid, and thereby the said plaintiff lost and was deprived of the service of his daughter and servant; and also by means of the said several premises the said plaintiff was forced and obliged to and necessarily did pay, lay out and expend divers sums of money, amounting to \$——, in and about the care and nursing of the said B., his said daughter and servant, and in and about the delivery of the said child, and suffered great anxiety and distress of body and mind, to the damage of this plaintiff of \$——.

[*Or*, By reason of the premises plaintiff has been and still

is deprived of the service of the said B., who has been rendered unable to maintain herself or assist the plaintiff.]

That the plaintiff has expended divers sums of money, to wit, the sum of \$——, about the nursing and maintaining of the said F. P., to the damage of the plaintiff in the sum of \$——.

[*Prayer.*]

NOTE.—Modeled from *Parker v. Monteith*, 7 Oreg. 277, where it was held that an allegation "that one F. P., the daughter of the plaintiff, was," etc., sufficiently avers that F. P. is the daughter of the plaintiff, and from *Riddle v. McGinnis*, 22 W. Va. 258.

Sec. 1129. Seduction — Defenses.—Want of chastity,¹ or connivance on the part of the parent,² may be shown as a defense to the action; but the infancy of the defendant in an action for seduction under promise of marriage,³ or consent,⁴ or the fact that the female was unchaste,⁵ or that the illicit connection was had with force and not by consent,⁶ does not constitute a defense.

Sec. 1130. Action for enticing away husband or wife.—The husband may maintain an action against one who entices away his wife.⁷ An action will lie against the parents of a married woman, in favor of her husband, for encouraging the former to separate from her husband, only when the motive of the parent was prompted by malice and ill-will towards the husband, and not when it was done in the honest belief that it was necessary for the protection of the wife.⁸ In such an action the charge that the defendant enticed and harbored plaintiff's wife with intent to deprive him of her society is a sufficient averment of his marriage to admit proof thereof.⁹ The wife may also maintain an action for the loss of the society and companionship of her husband against one who

¹ *State v. Thornton*, 108 Mo. 640 (1891).

² *Vossell v. Cole*, 10 Mo. 684.

³ *Becker v. Mason*, 98 Mich. 336; 58 N. W. Rep. 361; *Lee v. Hefley*, 21 Ind. 98.

⁴ *McCauley v. Birkhead*, 55 Am. Dec. 427.

⁵ *Smith v. Mulburn*, 17 Ia. 30; *Harrison v. Price*, 22 Ind. 165.

⁶ *Lawrence v. Spence*, 29 Hun, 169; *Damon v. Moore*, 5 Lans. 454.

⁷ *Rabe v. Hanna*, 5 O. 530; *Preston v. Bowers*, 12 O. S. 1; 3 *Lawson's R. & R.*, sec. 1105.

⁸ *Holtz v. Dick*, 42 O. S. 23; *Rabe v. Hanna*, 5 O. 530; *Preston v. Bowers*, 12 O. S. 1.

⁹ *Friend v. Thompson*, W. 636.

wrongfully and maliciously induces him to abandon or send her away.¹

Sec. 1131. Petition by husband against his wife's parents for maliciously enticing away his wife.—

Plaintiff says that on the — day of —, 18—, he was married to R., his wife, and continuously since that date has resided with his wife at —, until the — day of —, 18—, the date of the grievances hereinafter complained of. That until on or about —, 18—, plaintiff and his said wife lived happily together, his said wife bestowing upon plaintiff all the love and affection that could be desired in such relationship. That from the time of their said marriage, —, 18—, until the date of their separation hereinafter mentioned, his said wife, R., did not make nor has she since made the slightest complaint against plaintiff in any respect, nor had she in fact any cause for complaint. That plaintiff has sufficient means and ability to properly care for his said wife.

That the defendants A. B. and C. D. are the parents of his said wife, R. That the said defendants, maliciously and wickedly contriving and intending to injure plaintiff, and to destroy his peace and happiness, and to deprive him of the comfort, society and services of his said wife, R., and not for the protection of his said wife, did, solely because of their malice and ill-will towards plaintiff, induce and persuade his said wife to leave and separate from plaintiff in the following manner: [*State circumstances.*]

That on the — day of —, 18—, wholly by the acts aforesaid of the said defendants, and by their influence and persuasion, and not voluntarily or from her own choice and desire, his said wife, R., did leave and separate from plaintiff and they have not since lived together as man and wife.

That plaintiff has endeavored to persuade his said wife to again come and live and cohabit with him as his wife, but has been unable so to do, wholly on account of the power and influence of the said defendants over her, so as aforesaid maliciously and wilfully exerted.

That by reason of the premises plaintiff has sustained damages in the sum of \$——. [*State special damages.*]

[*Prayer.*]

NOTE.—Based on *Holtz v. Dick*, 42 O. S. 23. This may be varied when against other than the parents. This form may not be altogether inappropriately inserted here, as seduction means drawing aside from the path of duty.

¹ *Westlake v. Westlake*, 34 O. S. 621; his seductress, he becomes liable to *Clark v. Harlan*, 1 C. S. C. R. 418. If an action. *Scheurer v. Scheurer*, 3 the husband after divorce marries W. L. B. 689 (Cuya. C. P., 1878).

Sec. 1132. Petition for criminal conversation with wife.—

[Caption and formal averments.]

Plaintiff alleges that one C. D. is his wife, with whom he lived and cohabited since their marriage until their grievances hereinafter mentioned.

That the defendant, contriving and wrongfully and wickedly intending to injure plaintiff, and deprive him of the comfort and affection of his wife, did on the — day of —, 18—, and at divers other times, carnally know and seduce his said wife, and thereby alienated her affections from him, and he has since been wholly deprived of her comfort and society and services; that by reason of the unlawful and wilful conduct of said defendant, plaintiff has sustained damages in the sum of \$—, for which he asks judgment.

CHAPTER 81.

SPECIFIC PERFORMANCE.

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| <p>Sec. 1133. Specific performance — Parties.</p> <p>1134. General principles governing the action.</p> <p>1135. Enforceable contracts.</p> <p>1136. Parol contracts.</p> <p>1137. Demand and tender.</p> <p>1138. The petition.</p> <p>1139. Petition by vendor to compel vendee to complete contract of purchase.</p> <p>1140. Petition by vendee to compel vendor to make deed.</p> | <p>Sec. 1141. Petition to enforce performance of verbal contract of sale.</p> <p>1142. Petition against administrator of vendor on written contract for deed.</p> <p>1143. Petition to compel specific performance of contract to convey or give lands.</p> <p>1144. Non-enforceable contracts.</p> <p>1145. Specific performance—Defenses.</p> |
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Sec. 1133. Specific performance — Parties.— It is said that the rule that all parties having an interest in the subject-matter of an action should be made parties thereto does not have any application to an action for specific performance, but that it is confined to the immediate parties to the contract,¹ though the tendency of later decisions is towards a more comprehensive rule.² But a contract enforceable against an original party thereto may also be enforced against one holding under it by purchase.³ An assignee of a vendor is a proper party,⁴ though the creditors of a vendee should not be made parties.⁵ A personal representative is the proper party to enforce the performance of a contract in favor of his decedent's estate;⁶ and so in an action to compel the performance of a contract against the estate,⁷ in which case the heirs are also nec-

¹ *Washburn & M. M. Co. v. Wire Fence Co.*, 109 Ill. 71; *Fry on Specific Perf.*, sec. 79; *Willard v. Taylor*, 8 Wall. 557; *Pomeroy on Contracts*, sec. 483, and cases cited.

² *Id.*

³ *Bell v. Railroad Co.*, 8 O. C. C. 31; *Laverty v. Moore*, 33 N. Y. 658.

⁴ *Swepson v. McAden*, 65 N. C. 34; *Iron Railroad Co. v. Fink*, 41 O. S. 321.

⁵ *Hancnet v. McQueen*, 32 Mich. 22.

⁶ *Robinson v. Appleton*, 124 Ill. 276; *Sargent v. Sibley*, 8 W. L. B. 6.

⁷ *Potter v. Ellice*, 48 N. Y. 321.

essary parties.¹ A wife having a contingent right of dower need not be united with her husband in an action for the specific performance of a contract of the latter.² Nor is it essential that a trustee of a bare legal title be made a party where the vendee is content with the title;³ nor is an agent a proper party in a suit against his principal;⁴ nor can he sue for specific performance in his own name;⁵ nor should an adverse claimant, not in any way connected with the plaintiff, be made a defendant.⁶

Sec. 1134. General principles governing the action.—There is no definite rule as to when a court will or will not decree specific performance of a contract. It is a matter which depends largely upon circumstances and rests in the sound discretion of the court. This discretion, however, is not an arbitrary one, but is regulated by precedent and established practice.⁷ To entitle a person to the specific performance of a contract he must have been diligent,⁸ and the performance should be both mutual and complete;⁹ and if there is any uncertainty surrounding the contract it cannot be enforced.¹⁰ The plaintiff must be prompt, willing and anxious, and cannot have relief when he has wholly failed to perform his part of the agreement,¹¹ although aid will be extended to a person who has substantially though not literally com-

¹ *Webster v. Tibbets*, 19 Wis. 488; *Buck v. Buck*, 11 Paige, Ch. 170; *Peters v. Jones*, 35 Ia. 512; *Hubbard v. Johnson*, 77 Me. 189; *Thompson v. Smith*, 68 N. Y. 301; *Crabill v. Marsh*, 88 O. S. 881; *Mamie v. Donaldson*, 8 O. 379. See *Mosher v. Butler*, 81 O. S. 188.

² *Graf v. Wirthweine*, 1 Handy, 19. It is error to specifically enforce a contract against a husband making an allowance for prospective dower. *Lucas v. Scott*, 41 O. S. 636. See *Stanley v. Bedinger*, 2 O. C. C. 344.

³ *Hide v. Kelly*, 10 O. 215.

⁴ *Tavener v. Barrett*, 21 W. Va. 666; *Long v. Coman*, 10 Beav. 870; *White v. White*, 5 Gill, 359; *Jones v. Host*, 1 H. & M. 470.

⁵ *Morton v. Stone*, 39 Minn. 375; *Tavener v. Barrett*, *supra*.

⁶ *Ashley v. Little Rock*, 56 Ark. 391; 19 S. W. Rep. 1058 (1892); *Lange v. Jones*, 5 Leigh, 192; *Willard v. Taylor*, 8 Wall. 571. See *Seager v. Burns*, 4 Minn. 141; *Fussell v. Gregg*, 113 U. S. 550.

⁷ *Tiffin v. Shawhan*, 48 O. S. 178; *Railroad Co. v. Railroad Co.*, 18 O. S. 544-9; *Willard v. Taylor*, 8 Wall. 571.

⁸ *Brown v. Haines*, 12 O. 1.

⁹ *Owen v. Hall*, 18 O. S. 571; *Bourget v. Monroe*, 25 N. W. Rep. 514; *Bumpus v. Bumpus*, 58 Mich. 346.

¹⁰ *Parker v. Parker*, 5 O. C. C. 491; *Railroad Co. v. Railway Co.*, 1 O. C. C. 375; *Omaha Real Estate, etc. Co. v. Murphy*, 38 Neb. 800 (1892).

¹¹ *Campbell v. Hicks*, 19 O. S. 438.

plied with a contract.¹ Whether or not time becomes the essence of a contract depends upon circumstances. Such will be the case where parties have so stipulated;² or where from the nature of the contract the benefits derived must necessarily depend upon a strict performance in point of time.³ An action for specific performance cannot be joined with one for damages for breach of the same contract.⁴

Sec. 1135. Enforceable contracts.—The contracts most commonly sought to be enforced are those relating to real estate, although a valid contract for the sale of personalty may be enforced when there is no adequate remedy in damages.⁵ The principle upon which a contract is specifically performed is that justice cannot be done unless the plaintiff is granted the specific thing for which the contract is made.⁶ Another ground for the action is where there is a peculiar value attached to the contract which cannot be measured by damages.⁷ In every case there must be clear and convincing proof.⁸ And in an action to enforce the performance of a contract in favor of one who has contributed purchase-money, it should clearly appear what portion was contributed by him.⁹ A contract made by a tenant in common to convey the entire tract of land may be enforced only so far as his own interest is concerned; but the court may allow compensation for the outstanding interest by way of punishment for contracting to sell something which he does not possess;¹⁰ and a contract for a lease may be enforced, even though the quantity of land leased is less than that described, and compensation may be allowed for any material difference.¹¹ It has been frequently judicially asserted that specific performance is the proper rem-

¹ *Rees v. Smith*, 1 O. 124.

⁷ *Paddock v. Davenport*, 107 N. C.

² *Brock v. Hidy*, 18 O. S. 306; *Hager v. Reed*, 11 O. S. 626; *Scott v. Fields*, 7 O. (Pt. 2), 424.

710.

⁸ *Bicket v. White*, 27 O. S. 405.

⁹ *Maud v. Maud*, 33 O. S. 147.

³ *Kirby v. Harrison*, 2 O. S. 326; *Brock v. Hidy*, *supra*.

¹⁰ *Longworth v. Mitchell*, 26 O. S. 384.

⁴ *Pinkum v. Eau Claire*, 81 Wis. 301.

¹¹ *Bowler v. Electric Light Co.*, 22

⁵ *Adams v. Messenger*, 20 W. L. B. 262.

W. L. B. 186; *King v. Wilson*, 6 Beav. 124; *Winne v. Reynolds*, 6 Paige, Ch. 410; *Fry on Specific Performance*, sec. 1194.

⁶ *Wait's A. & D.* 763; *Shimer v. Banking Co.*, 27 N. J. Eq. 364; *Stuyvesant v. Mayon*, 11 Paige, Ch. 414.

edy to enforce a contract to give and bequeath property, made by a decedent, and fully performed by the one in whose favor it is made.¹

Sec. 1136. Parol contracts.—While courts cannot ordinarily enforce a verbal contract for the sale of lands, yet relief will be granted when by means of such a contract fraud may be perpetrated.² But, before it will be enforced, it must be clearly proven both as to the fact of execution and its terms.³ The rule is universal that a parol contract to convey land will be enforced⁴ when followed by possession, or valuable improvements made upon the land.⁵ Mere payment of consideration will not be sufficient.⁶ The most common illustration of this doctrine is where a parol contract is made by a parent of a child to convey land, under which the latter takes possession and makes valuable improvements thereon.⁷ But a parol contract made with reference to both real and personal property, the consideration of which is indivisible, falls within the statute of frauds and cannot therefore be enforced.⁸

Sec. 1137. Demand and tender.—As a general rule, demand must be alleged in an action to compel the specific performance of a contract.⁹ But this, of course, is unnecessary where the facts alleged show that it has been waived or that the contract has been repudiated or denied.¹⁰ Nor is a demand necessary where a person is entitled to a conveyance upon request.¹¹ It has been stated that the plaintiff must be prompt, willing and anxious,¹² and it is therefore necessary that his

¹ *Emery v. Darling*, 50 O. S. 160, where the authorities are fully reviewed. This is true of certain parol contracts, as shown by the next succeeding section. See, also, writer's note to *Shahan v. Swan*, in 32 Cent. L. J. 205-8.

² *Watson v. Erb*, 88 O. S. 85.

³ *Worthington v. Worthington*, 83 Neb. 384; 49 N. W. Rep. 354 (1891), and cases cited; *Cutsinger v. Ballard*, 115 Ind. 98.

⁴ *Putman v. Tinkler*, 83 Mich. 628, and cases cited.

⁵ *Peters v. Jones*, 85 Ia. 512.

⁶ *Sites v. Keller*, 6 O. 488.

⁷ *Burlingame v. Rowland*, 77 Cal. 815, and cases cited; *Swales v. Jackson*, 126 Ind. 282.

⁸ *Shahan v. Swan*, 48 O. S. 25, and author's note in 32 Cent. L. J. 205-8.

⁹ *Burns v. Fox*, 118 Ind. 205; *Reed v. Hodges*, 80 Ind. 304; *Harless v. Petty*, 84 Ind. 269.

¹⁰ *Pawlak v. Granowski*, 55 N. W. Rep. 83 (Minn., 1893); *Denlar v. Hille*, 128 Ind. 68.

¹¹ *Bruce v. Tillson*, 25 N. Y. 194.

¹² *Campbell v. Hicks*, 19 O. S. 483. See *ante*, sec. 1134.

willingness be shown by his pleadings. If a vendee seeks to enforce a contract for the sale of lands, he must tender or bring the money into court, unless the contract be denied.¹ Of course a tender is unnecessary where it is certain that it will be refused,² or where the facts stated show a repudiation of the contract.³ A tender of performance, however, can avail nothing unless the party is in a condition to perform at the time.⁴ A vendor must tender a good title within a reasonable time before he can enforce a contract for the sale of land,⁵ which must be a marketable title.⁶ An allegation in a petition "that the plaintiff tendered to the defendant a conveyance of said land and demanded payment of the purchase-money, and that a deed is herewith filed and tendered to him," is not denied by an answer that the plaintiff did not, within a reasonable time, tender to the defendant a conveyance or seek to enforce the contract until a day named.⁷ A legal or valid tender need not be made where there is an offer of performance of all conditions.⁸

Sec. 1138. The petition.—The contract should be set out with exactness, whether verbal or written. The consideration, debt, terms and stipulations must be specifically alleged.⁹ It has been held, however, that a petition for the enforcement of an oral contract which sets forth such a part performance as would take it out of the statute of frauds is sufficient, whether it be stated that the contract was verbal or written.¹⁰ It is not necessary to set forth the manner of the execution of the contract.¹¹ Ownership and possession at the time of tendering a deed and demand of purchase-money should be alleged in an action by the vendor;¹² and in case of a parol contract, the averment as to possession must be clear and ex-

¹ Fall v. Hazelrigg, 45 Ind. 576; Brook v. Hidy, 18 O. S. 306; Irwin v. Gregory, 18 Gray, 215; Crary v. Smith, 2 N. Y. 60.

² Bickett v. White, 1 C. S. C. R. 170.

³ Martin v. Merritt, 57 Ind. 34; Brown v. Eaton, 31 Minn. 409; Vappell v. Woodward, 2 Sandf. Ch. 143; Crary v. Smith, 2 N. Y. 60.

⁴ House v. Beatty, 7 O. (Pt. 2), 84.

⁵ Ursuline Community v. Huneke, 34 W. L. B. 153.

⁶ Rife v. Lybarger, 49 O. S. 422.

⁷ Tiffin v. Shawhan, 48 O. S. 178.

⁸ Pomeroy v. Fullerton, 21 S. W. Rep. 19 (Mo., 1893).

⁹ Gaskins v. People, 44 Tex. 390;

Ward v. Stuart, 62 Tex. 333.

¹⁰ Slingerland v. Slingerland, 46 Minn. 100; 48 N. W. Rep. 605.

¹¹ Hanschett v. McQueen, 33 Mich. 22.

¹² Sargeant v. Sibley, 8 W. L. B. 6.

plicit.¹ An allegation that the plaintiff has duly performed the conditions on his part to be performed is equivalent to averring payment of a cash payment required, or the execution, tender or delivery of a mortgage as agreed upon.² A petition, however, which sets forth a contract and asks for specific performance and for general relief cannot be considered as asking for a money judgment.³ It is equally essential that the petition should specifically set forth the breach claimed;⁴ and where there has been an absolute refusal to perform, thereby rendering a tender unnecessary, such refusal and omission to tender must not only be alleged, but that the plaintiff, though so excused, is still ready and willing to perform.⁵ A plaintiff may either ask for the specific performance, or that adequate compensation be granted for the non-performance. To entitle him to this alternative relief, however, he must repay any money received or make a tender.⁶ A money judgment for compensation may be rendered,⁷ or he may ask to have a contract specifically performed by some of the defendants, and for the enforcement of a lien as to others.⁸ Ordinarily a description in a contract with reference to real estate is adequate if it is sufficiently definite to enable the purchaser to know what he is buying.⁹ But where it is necessary to resort to extrinsic evidence to make it definite, the petition should show all the facts and what is desired before a decree will be granted.¹⁰ And the contract may be reformed and enforced in the same action.¹¹

Sec. 1139. Petition by vendor to compel vendee to complete contract of purchase.—

Plaintiff alleges that on the — day of —, 18—, he was the owner in fee-simple of the following described premises situate in the county of —, Ohio, to wit: [*Description.*]

¹ Swales v. Jackson, 126 Ind. 282.

Mossman v. Schultze, 5 Am. Law

² Pomeroy v. Fullerton, 21 S. W. Rep. 19 (Mo., 1898).

Rec. 425.

³ Rush v. Brown, 101 Mo. 586.

⁷ Ashley v. Little Rock, 56 Ark. 391; 19 S. W. Rep. 1058 (1892).

⁴ De Lacy v. Wolcott, 21 N. Y. S. 619.

⁸ Bacon v. Leslie, 50 Kan. 494; Hollis v. Burgess, 37 Kan. 494; Fowler v. Redican, 52 Ill. 405.

⁵ Marie v. Garrison, 45 N. Y. Super. 157. See ante, sec. 1184; Frixen v. Castro, 58 Cal. 442.

⁹ Bacon v. Leslie, *supra*.

⁶ Railroad Co. v. Steinfeld, 42 O. S. 449.

¹⁰ Bacon v. Leslie, *supra*.

That on the — day of —, 18—, plaintiff entered into a contract in writing with the defendant, whereby it was agreed that plaintiff would sell said premises, and defendant agreed to purchase the same for the sum of \$—, in the following payments: one-half to be paid in cash, and the remainder thereof to be paid in one year, said deferred payment to bear interest at the rate of — per cent. and be secured by mortgage upon the premises sold.

That it was agreed between plaintiff and defendant that the sale was to be completed and the deed and mortgage passed between them on the — day of —, 18—.

That upon that date plaintiff duly tendered said defendant a good and sufficient deed for the above-described premises, and has complied with all the conditions on his part to be performed pursuant to said agreement.

That the defendant upon said date refused, and still refuses, to perform and carry out said contract and to make said purchase, or to pay said sum of \$—, or to execute said mortgage.

Plaintiff therefore prays that said defendant be required to carry out and perform said contract, to pay said purchase-money, to execute said mortgage, and for such relief as is proper.

Sec. 1140. Petition by vendee to compel vendor to make deed.—

Defendant was on the — day of —, 18—, the owner of and seized in fee-simple of the following described real estate, viz.: [*Describe premises.*] That on said day plaintiff entered into an agreement in writing with the defendant whereby it was agreed that in consideration of the sum of \$—, to be paid by this plaintiff in the following manner [*state terms*], that said defendant would sell and convey said premises to plaintiff by a good and sufficient deed of warranty.

That on the — day of —, 18—, according to the terms of said contract, the plaintiff duly tendered to the defendant said sum of \$—, and requested him to convey said premises to plaintiff as provided by said agreement, but the defendant refused and still refuses to execute and deliver such conveyance.

That the plaintiff has duly performed all the conditions of said agreement on his part, and is ready and willing to pay said purchase-money, and now brings said sum of \$— into court and offers the same to said defendant, upon his executing and delivering to plaintiff a sufficient conveyance of said premises according to the terms of said contract.

Plaintiff therefore prays that the court order and decree that the defendant convey said premises to plaintiff by a good and sufficient deed, and for such relief as may seem equitable.

Sec. 1141. Petition to enforce performance of verbal contract of sale.—

Plaintiff alleges that on the — day of —, 18—, the defendant was the owner in fee-simple of the following described premises, viz.: [*Describe premises.*] On said date plaintiff entered into a contract not in writing, by which said defendant agreed to sell said premises to the plaintiff for the sum of \$—.

The terms of said contract were as follows: [*State terms, as:*] Plaintiff paid to defendant, upon the day of making said contract, the sum of \$— as part of the purchase-price thereof, and agreed to pay the balance thereof in the following manner: [*State how.*] That plaintiff immediately went into possession of said premises and is still in possession of the same, and has, while he has so been in possession, made permanent and valuable improvements thereon, to wit: [*State what.*] On the — day of —, 18—, plaintiff tendered to defendant the sum of \$—, the balance of the purchase-money remaining due from him upon such sale, and demanded of defendant that he make and execute a deed for said premises in accordance with their said agreement, but that the defendant then refused so to do and still refuses to execute and deliver to plaintiff a deed for said premises. Plaintiff has duly performed all the conditions of said agreement by him to be performed, and is still willing so to do, and now brings the balance of the unpaid purchase-price of said premises into court and tenders the same to plaintiff upon condition that defendant will carry out and perform his contract and make, execute and deliver a deed for said premises to plaintiff.

Plaintiff therefore asks that the court decree that plaintiff be compelled to specifically perform his said contract and convey said premises to plaintiff according to their said contract, etc.

Sec. 1142. Petition against administrator of vendor on written contract for deed.—

The defendant A. B. was on the — day of —, 18—, duly appointed by the probate court of — county, Ohio, administrator of the estate of C. D., who died on the — day of —, 18—.

Plaintiff says that the said C. D., deceased, was the owner and seized in fee-simple of the following described premises, situate, etc.: [*Description.*] That during the life-time of the said C. D., to wit, on the — day of —, 18—, plaintiff entered into a contract with said C. D., deceased, whereby said C. D. agreed that upon payment to him by this plaintiff of the sum of \$— [*if deferred payments, so state*], he would sell and convey said premises to this plaintiff by deed of general warranty, which contract [*state material part of contract*].

That on the — day of —, 18—, the plaintiff paid to said

C. D. the sum of \$——, being part of the purchase-money, in accordance with the terms of their said agreement.

Plaintiff has performed all the conditions of said contract, excepting the payment of the balance of the purchase-money, but is still willing to pay the same in accordance with the terms of said contract, and now brings the said sum of \$——, the balance of said purchase-money, into court, and tenders the same to said C. D., as such administrator, when she shall make and deliver a deed of conveyance for said premises to plaintiff.

[*Prayer.*]

Sec. 1143. Petition to compel specific performance of contract to convey or give lands.—

That on the —— day of ——, 18—, one L. V. was the owner in fee-simple of the following described real estate, situated in —— county, state of ——: [*describe it*], [and said R. V. was then his wife].

That on the —— day of ——, 18—, said L. V. died intestate, leaving surviving him R. V., his widow, and U. V. and T. V., his only children, and leaving no other heirs at law, and still being the owner of said real estate.

That the plaintiff was the nephew of said L. V., and on the said —— day of ——, 18—, in consideration of love and affection, and for the further consideration that plaintiff would assist, with his money, time and labor, in the erection of a house and barn upon said premises, and would take possession [when notified] and occupy the same, and make valuable and permanent improvements thereon, he [they], the said L. V. [and R. V.], proposed to plaintiff that he [they] would convey to him said real estate on condition that plaintiff would pay to him [them] one-half of the crops that might grow and be raised upon said premises.

That plaintiff then and there accepted said proposition and assisted with his labor, time and money in the erection of said barn and house [and afterwards married], and in pursuance of said contract, and relying upon the same, on or about the —— day of ——, 18—, moved upon and took possession of said premises, and has ever since occupied and held possession thereof, turning over to said L. V. [and R. V.], until his [their] death[s], one-half of the crops grown and raised on said premises according to the terms of said agreement.

That plaintiff, in reliance upon said contract, has made lasting and valuable improvements on said premises, in this: he has dug and walled a well, graded a lot on which said house stands, made walks, built permanent and lasting fences, set out shade trees which are now growing thereon, and changed the fences so as to separate said real estate from the other lands of said L. V. [and R. V.].

That said improvements were all made with the knowledge and consent of said L. V. and upon the faith of said contract.

That said L. V. [and R. V.], during his [their] life-time, frequently promised to convey by deed to plaintiff said tract of land in fee-simple, but before he [they] carried out said intention he [they] suddenly and unexpectedly died, intestate, without having executed any deed of conveyance to plaintiff for said premises.

That plaintiff has demanded a deed of the defendants, which they have refused, and they have also refused to carry out and execute the terms of said contract and have denied the same.

[*Prayer.*]

NOTE.—Modeled from *Puterbaugh v. Puterbaugh*, 181 Ind. 288. See *Shahan v. Swan*, 48 O. S. 25; *Fry on Specific Performance*, sec. 558; *Pomeroy on Specific Performance*, sec. 107.

Sec. 1144. Non-enforceable contracts.—Where the terms of a contract are vague, indefinite or doubtful, it cannot be enforced;¹ and so with one which is illegal,² or where performance is impossible.³ Nor will a contract entered into by mistake, unless mutual,⁴ or one which is tainted with fraud,⁵ or one which cannot be rescinded,⁶ be enforced. So with a contract entered into by mutual mistake, which is surrounded with suspicion showing bad faith,⁷ or a mere negative option to purchase land;⁸ or a contract to reconvey premises upon certain conditions, will not be enforced as against an absolute deed, unless the same is clear, satisfactory and honest;⁹ or a contract to convey real estate in consideration of personal services to be performed.¹⁰ Nor will a contract for the sale of land be enforced where the title is the subject-matter of another suit, even though in the opinion of the court the litigation is groundless.¹¹ A conditional contract in which one

¹ *Railroad Co. v. Railway Co.*, 1 O. C. C. 275; *Breuer v. Hayes*, 23 W. L. B. 144 (C. S. C. R., 1889).

² *Sprague v. Rooney*, 104 Mo. 671; 16 S. W. Rep. 501 (1891).

³ *Angus v. Robinson*, 63 Vt. 60.

⁴ *Craft v. Egan*, 80 W. L. B. 127 (Mo., 1893).

⁵ *Wingart v. Fry*, W. 105; *Gray v. Tappan*, W. 117.

⁶ *Watkins v. Collins*, 11 O. 31; *Kirby v. Harrison*, 2 O. S. 327.

⁷ *Craft v. Egan*, *supra*.

⁸ *Litz v. Goosling*, 28 W. L. B. 222 (Ky., 1892), and cases cited.

⁹ *Sewell v. Lovett*, 6 W. L. B. 63 (Ham. Co. D. C.).

¹⁰ *Ikerd v. Beavers*, 106 Ind. 483; *Lindsey v. Glass*, 119 Ind. 301; *Dunbar v. Hile*, 128 Ind. 68.

¹¹ *Hopple v. Overbeck*, 20 W. L. B. 25 (C. S. C. R., 1888); *Ambrose v.*

of the parties thereto is made a judge of the conditions cannot be specifically enforced if the same is not performed satisfactorily.¹ Nor will courts ordinarily decree specific performance of a contract where it would require a long-continued performance of personal acts or the exercise of skill.² But where in such a case the demand for the exercise of such power is great, as the operation of a railroad, a decree may sometimes be granted.³

Sec. 1145. Specific performance—Defenses.—A defendant cannot urge the fact that his title to the land is contested by a suit instituted after the contract was entered into, in which it was sought to set aside the conveyance for fraud.⁴ Nor can he set up an indebtedness due him upon other accounts not connected with the contract.⁵ Nor will inadequacy of price furnish a reason for refusing to compel the execution of a contract where a vendor holds the purchase-money and refuses to rescind.⁶ A defendant in an action for a breach of a contract may ask that the action be considered as one for specific performance. If that be done he cannot afterwards complain if the court give him his election to perform or to answer for any damages or compensation.⁷ Under a general denial in an action for specific performance, the contract may be shown to be in fact a lease, made in violation of law.⁸ But under a general denial of the execution of a contract, it cannot be shown that the defendant is a married man and that his wife did not join.⁹

¹ *Crigler v. Blair*, 4 O. C. C. 324, and cases cited; *Sargeant v. Sibey*, 11 W. L. B. 177.

² *Van Tyne v. Short*, 4 W. L. B. 1149.

³ *Railroad Co. v. Railroad Co.*, 18 O. S. 544-49.

⁴ *Stanley v. Beddinger*, 2 O. C. C. 344.

⁵ *Kight v. Luke*, 69 Ala. 423; *Pulian v. Owen*, 25 Ala. 492; *Sims v. McEwen*, 27 Ala. 184.

⁶ *Galloway v. Barr*, 12 O. 354.

⁷ *Mealey v. Finnegan*, 46 Minn. 507.

⁸ *Sprague v. Rooney*, 104 Mo. 349.

The effect of a general denial is to deny that there is any legal contract. *Bliss on Code Pldg.*, secs. 324, 352; *Northrup v. Insurance Co.*, 47 Mo. 435; *Young v. Glasscock*, 79 Mo. 574.

⁹ *Brown v. Eaton*, 21 Minn. 409.

CHAPTER 82.

STATUTE OF LIMITATIONS.

Sec. 1146. Nature of the defense.

1147. To what cases applicable.

1148. What plaintiff must allege.

Sec. 1149. Petition where note relieved from statute by new promise.

1150. How taken advantage of by defendant.

Sec. 1146. Nature of the defense.—At one time courts did not look with much favor upon the plea of the statute of limitations, and therefore held parties to their strict legal rights if they wished to take the benefit of it. Leave to plead the statute was seldom granted,¹ and would only be granted under peculiar circumstances;² and now courts will, in their discretion, refuse to allow a stale defense of the statute to be made at the hearing or before judgment.³ The bar is a personal privilege and may be waived by a subsequent promise or by failure to take advantage of the same in an action.⁴ Nor can it be taken advantage of by another, and may prevail as to one party and fail as to another.⁵ Nor can it be extended to one not within its saving clause.⁶ The statute is now regarded more favorably and considered as one of repose.⁷ It is a meritorious defense and may be pleaded in equity as well as at law. It is not available under every and all circumstances, especially when it becomes an unconscientious defense.⁸ Rights must be determined by the statute in force at the time they accrue.⁹ Only such features as bear upon the question of pleading will be noticed. The subject is treated generally in a former section.¹⁰

Sec. 1147. To what cases applicable.—The statute does not apply to a continuing or subsisting trust.¹¹ Yet where a

¹ Flynn v. Elliott, 1 W. L. J. 394.

² Sheets v. Baldwin, 12 O. 120.

³ Campbell v. Campbell, 3 O. C. C. 449.

⁴ Turner v. Chrisman, 20 O. 332; Zieverink v. Kemper, 19 W. L. B. 270 (C. S. C. R.); Vose v. Woodford, 29 O. S. 245; Joyce v. Hart, 27 W. L. B. 144; Railroad Co. v. Hine, 25 O. S. 629.

⁵ Barr v. Chapman, 30 W. L. B. 284.

⁶ Bronson v. Adams, 10 O. 135.

⁷ Maxwell on Code Pldg. 472.

⁸ Treasurer v. Martin, 50 O. S. 197.

⁹ Ham v. Kunzi, 56 O. S. 531.

¹⁰ *Ante*, secs. 65-17, 65-18.

¹¹ R. S., sec 4974. Sheriff receiving money in his official capacity is not a trustee. Townsend v. Eichelberger, 51 O. S. 213.

trustee disclaims his trust with the knowledge of the *cestui que trust*, and retains an unbroken possession of property for a period sufficient to constitute a bar, such possession may be then relied upon as a defense.¹ A devise to a son with an obligation to pay another a legacy is not a trust.² Nor does it apply to an action by a vendee of real property, in possession thereof, to obtain a conveyance;³ but will only apply to such actions as survive at common law, or those which the code provides shall survive, as actions for *mesne* profits, injuries to person or property, or for deceit or fraud.⁴ The statute begins to run from the time the cause of action accrues, unless a party be under some disability, as absence from the state,⁵ or is a minor, or of unsound mind or imprisoned;⁶ in which case it begins to run from the removal of the disability,⁷ and continues until an action is commenced, which is when the summons is served upon the defendant, or at the date of the first publication when service is so made.⁸ There are other things, however, which will rest it from its operation, which are said to be exceptions, such as payment, written acknowledgment, promise to pay made and signed by the party charged, in which case the statute runs from the payment, acknowledgment or promise.⁹ If the action is barred by the laws of a sister state where it arose it is also barred where suit is brought.¹⁰ In some states the doctrine has been adopted that, where there is a legal and equitable remedy in respect to the same matter, the latter is under the control of the same statutory bar as the former.¹¹

¹ *Williams v. Society*, 1 O. S. 478; *ute to running. Stanley v. Stanley*, 47 O. S. 225.

² *Yearly v. Long*, 40 O. S. 27; *Longley v. Stump*, 11 W. L. B. 247. Nor is the receipt of money by an attorney. *Douglass v. Corry*, 21 W. L. B. 852; *Carpenter v. Canal Co.*, 35 O. S. 817.

³ R. S., sec. 4974.

⁴ O. Code, sec. 4975; 90 O. L. 140; *Whittaker's Ohio Civ. Code* (4th Rev. ed.), p. 8.

⁵ R. S., sec. 4989. A non-resident who occasionally comes into the state will not by his presence set the stat-

⁶ R. S., secs. 4986, 4978.

⁷ *Covenanty v. Atherton*, 9 O. S. 4; *Pendegrast v. Foley*, 8 Ga. 1.

⁸ R. S., sec. 4987; *ante*, sec. 7.

⁹ R. S., sec. 4992; *Coffman v. Secor*, 40 O. S. 687. By sureties, *Winchell v. Hicks*, 18 N. Y. 558. A verbal promise will not have that effect. *Stephenson v. Line*, 7 O. C. C. 147.

¹⁰ R. S., sec. 4990.

¹¹ *Quayle v. Guild*, 91 Ill. 378; *Mancock v. Harper*, 86 Ill. 445; *Carter v. Tice*, 120 Ill. 277; *Harding v. Durand*, 138 Ill. 515 (1891).

Sec. 1148. What plaintiff must allege.—The presumption is that a cause of action is barred, and if the fact that a party plaintiff was under age, of unsound mind or absent from the state, or the transaction was tainted with fraud, be relied upon to remove the statutory bar, such facts must be stated to bring a cause within any of the exceptions.¹ If a new promise be relied upon to take the case out of the statute, it must not be uncertain, but an acknowledgment of a certain definite sum.² A new consideration for the promise is unnecessary, and hence one need not be alleged.³ It has been held that, where the claim is removed from the bar of the statute by a new promise, suit should be brought upon the new promise as a new cause of action and not upon the original debt.⁴ This view, however, is not shared by other courts, which hold it unnecessary to even allege a new promise.⁵ The latter rule can hardly be consonant with the terms of the statute. A barred claim can only be the foundation of an action when it falls within one of the exceptions provided, and to show that the claim constitutes a cause of action it is absolutely essential that every fact necessary to show that an action exists should be stated. One of those facts is that a new promise was made, and it must be specifically alleged in the petition that a promise in writing was made.⁶ A petition cannot be amended so as to bring in a portion of a claim omitted from the original one, which has become barred since the commencement of the

¹ *Bass v. Berry*, 51 Cal. 264; *Humbert v. Rector*, 7 Paige, 195; *Sublette v. Tinner*, 9 Cal. 423. The facts which bring the party within the saving clause must be stated. *Piatt v. Linton*, 35 O. S. 232; *Hanover v. Sperry*, 35 O. S. 244. This is not applicable to a defendant in error. *Railroad Co. v. Wick*, 35 O. S. 247. An allegation, "that by the laws of I. the statute provided that an action of debt on a promissory note may be commenced within ten years from the time the cause of action accrued; that the defendant has resided in the state of N. since the giving of said note, and prior to the commencement

of this action, for the space of three years only," has been held a sufficient allegation to remove the action from the statute. *Minnesota H. Works v. Smith*, 36 Neb. 616; 54 N. W. Rep. 973 (1893).

² *Quarrier v. Quarrier*, 36 W. Va. 310.

³ *Parks v. Brooks*, 17 S. E. Rep. 22 (S. C., 1893).

⁴ *Fleming v. Fleming*, 12 S. E. Rep. 257; 33 S. C. 510; *Sepaugh v. Smith*, 14 S. E. Rep. 939 (S. C., 1893).

⁵ *Sands v. St. John*, 36 Barb. 628; *Baldwin v. Martin*, 14 Abb. Pr. (N. S.) 9.

⁶ *Smith v. Beeler*, 19 Kan. 669.

action.¹ Such matter may be stricken out by motion.² If it is not barred by reason of falling within an exception, an amendment may be made to show that fact.³ The statute will bar an answer seeking to open and surcharge a settlement for fraud, of which a defendant had knowledge more than four years before the action was brought.⁴ Where the statute is pleaded in an answer, it is new matter requiring a reply;⁵ and a reply which denies that the action is barred, as claimed in the answer, will authorize the plaintiff to prove himself within a saving clause.⁶

Sec. 1149. Petition where note is relieved from statute by new promise.—

There is due plaintiff from defendant the sum of \$——, upon a promissory note, of which the following is a copy, etc. [*Copy of note. See chapter on Bills and Notes, sec. 296.*]

That on the —— day of ——, 18——, after said note became barred by the statute of limitations, the defendant promised the plaintiff in writing that he would pay said note, which said promise is in the words following: [*Copy promise in writing.*]
[*Prayer.*]

NOTE.—See, also, form in *Minneapolis H. Works v. Smith*, 36 Neb. 616; 54 N. W. Rep. 971.

Sec. 1150. How taken advantage of by defendant.— There is a lack of uniformity in the various states as to the manner of claiming the benefit of the statute, some adopting the view that it can only be by answer, and that a demurrer will not reach it even where the petition shows upon its face that the claim is barred.⁷ The rule has been frequently asserted that the statute must be specially pleaded to be available.⁸ This means that it must be by answer or demurrer,⁹

¹ *Hills v. Ludwig*, 46 O. S. 373; *Commissioners v. Andrews*, 18 O. S. 50.

² *Commissioners v. Andrews*, 18 O. S. 49.

³ *Trustees v. Wright*, 12 Ill. 441; *Walker v. Ray*, 111 Ill. 315; *Switzer v. Noffsinger*, 82 Va. 518; *Harding v. Durain*, 188 Ill. 515.

⁴ *Railroad Co. v. Smith*, 48 O. S. 219.

⁵ *Harlen v. Watson*, 68 Ind. 148; *Baldwin v. Martin*, 14 Abb. Pr. (N. S.)

9; *Pomeroy's Code Rem.*, sec. 714.

⁶ *Smith v. Bartram*, 11 O. S. 690.

⁷ *Bliss on Code Pldg.*, sec. 355. See *Pomeroy's Code Rem.*, secs. 713, 714, where authorities are collected.

⁸ *Haymaker v. Haymaker*, 4 O. S. 272; *Alexander v. Meyers*, 33 Neb. 778; 51 N. W. Rep. 140; *Albertson v. Terry*, 18 S. E. Rep. 718; 109 N. C. 8; *Humphreys v. Spencer*, 14 S. E. Rep. 410; *Boone's Pleading*, sec. 69.

⁹ *Alexander v. Meyers*, 33 Neb. 778 (1892); *Towsley v. Moore*, 30 O. S. 195; *McKinney v. McKinney*, 8 O. S. 423.

and is waived unless raised by either.¹ Mr. Bliss states the rule to be that, where the petition on its face shows the claim is barred, a demurrer will lie, and that such was the equity practice, and that if the complaint does not show it to be barred the defense must be made by answer and not demurrer. This is stated as the universal rule, and it need only be added that it is still the approved doctrine,² excepting in those states which cling to the rule that a demurrer can under no circumstance raise the issue.³

The only dispute among the states adopting the rule that a demurrer may be interposed is whether a general demurrer will raise the bar of statute, or whether it must be made a specific ground. Some courts hold that a general demurrer, upon the ground that the petition does not state facts sufficient to constitute a cause of action, will not raise the question;⁴ while it has been conceded by others that a general demurrer may be made upon the ground that the action is barred,⁵ yet consider the better practice to make the defense a specific ground of demurrer.⁶ All unite upon the common ground that the bar by a statute of a foreign state cannot be raised by a demurrer, but must be specially pleaded, as judicial notice cannot be taken of foreign statutes.⁷ It is also

¹ *Blue v. Hoke*, 3 W. L. M. 100. See cases cited *ante*, sec. 104, p. 105, n. 9.

² *Huston v. Craighead*, 28 O. S. 198; *Sturges v. Burton*, 8 O. S. 215; *Vose v. Woodford*, 29 O. S. 245; *Seymour v. Railroad Co.*, 44 O. S. 12; *Douglas v. Corry*, 46 O. S. 349; *Bonte v. Taylor*, 24 O. S. 628; *Pomeroy's Code Rem.*, sec. 714, and cases cited. If it is apparent on the face of the petition that an action is barred, and also that the case does not fall within any of the exceptions of the statute, then the question as to the action being barred may be raised by demurrer. *Harlen v. Watson*, 63 Ind. 143; *Milner v. Hyland*, 77 Ind. 458. And as a demurrer searches the record if filed by plaintiff, to the answer of the defendant, and it appears that plaintiff's claim is barred it will be sustained. *W. & L. E. Ry. Co., v. Fries*, 7 Oh. Dec. 297; 14 O. C. C. 55.

³ *Pomeroy's Code Rem.*, sec. 714, and cases cited.

⁴ *Barnes v. Railway Co.*, 54 Fed. Rep. 87 (Colo., 1893); *Hunt v. Hayt*, 10 Colo. 210; 17 Pac. Rep. 771; *Spengenberg v. Swartz*, 11 W. L. B. 283.

⁵ *Irwin v. Garretson*, 1 C. S. C. R. 533; *Railway Company v. Franz*, 43 O. S. 625; *Sturges v. Burton*, 8 O. S. 215; *Bissell v. Jaundon*, 16 O. S. 504.

⁶ *Seymour v. Railroad Co.*, 44 O. S. 12; *Vose v. Woodford*, 29 O. S. 245; *Douglas v. Corry*, 46 O. S. 349; *Bonte v. Taylor*, 24 O. S. 628; *McKinney v. McKinney*, 8 O. S. 423; *Brennan v. Ford*, 46 Cal. 7; *Rivers v. Washington*, 34 Tex. 267.

⁷ *Whelan v. Kinsley*, 26 O. S. 181; *Hoyt v. McNeil*, 18 Minn. 390; *Gillet v. Hill*, 32 Ia. 220; *Thomas v. Chamberlain*, 39 O. S. 112; *Piper v. Hoard*, 107 N. Y. 67; *Paine v. Comstock*, 57 Wis. 159; *Minnesota H. Works v. Smith*, 36 Neb. 616; 53 N. W. Rep. 973.

commonly conceded that the statute may be taken advantage of under a general denial, in an action for the recovery of the possession of real estate, as it is in substance a denial of title.¹ From what has already been stated, it would seem that the bar of the statute cannot be raised under a general denial in any action other than that just stated, and it has been held in a number of Ohio cases other than actions to recover realty that the defendant, to have the benefit of the statute, should insist upon it as a bar in his answer, or as a specific ground of demurrer. If instead of doing so he simply denies the allegations of the petition, he cannot, on the trial also insist upon the bar of the statute.² If the statute be raised by answer,³ an allegation that a cause of action did not accrue within six years, denying a payment on a day named, being a negative pregnant, is not good.⁴ An averment in an answer to a statute should be, "that the cause of action did not accrue within six years next before the commencement of the action."⁵ It has been stated as the better and safer practice in pleading a statute of a foreign state to set out a copy in the pleading, although it was held sufficient to allege the substance of the statute relied upon, which seems to be the better rule.⁶ And the latter view is shared by other courts, which hold it unnecessary to state the facts, but allow a general allegation that the cause of action is barred by the laws of a foreign state, giving the number of the section.⁷ It is not necessary to refer to or negative an exception or proviso of the statute.⁸ The statute may be pleaded against a set-off,⁹ but a debt barred by statute cannot be claimed as a set-off.¹⁰ A defendant can take advantage of the statute only in the trial court.¹¹

¹ Burchell v. Neaster, 36 O. S. 331; See 31 O. S. 421; Kyser v. Cannon, 29 O. S. 359; Bird v. Sellers, 21 S. W. Rep. 91 (Mo., 1893); Lain v. Shepardson, 23 Wis. 224; Bruck v. Tucker, 42 Cal. 346; Fulkerson v. Mitchell, 82 Ga. 18; Stocker v. Green, 94 Mo. 280.

² Towsley v. Moore, 30 O. S. 184; McKinney v. McKinney, 8 O. S. 428; Vose v. Woodford, 29 O. S. 245; Kelly v. Weisman, 2 Disn. 418; Lockwood v. Wiedman, 18 O. 430; Parker v. Berry, 12 Kan. 351; Perkins v. Rogers, 85 Ind. 124; Cook v. Chambers, 107 Ind. 67.

³ Highstone v. Franks, 98 Mich. 52.

⁴ Argard v. Parker, 81 Wis. 581.

⁵ Ind. etc. Ry. Co. v. Centre Township, 130 Ind. 84.

⁶ Minneapolis R. Works v. Smith, 36 Neb. 616; 54 N. W. Rep. 972 (1893).

⁷ Walters v. Thomas, 32 Pac. Rep. 565 (Cal., 1898); Allen v. Allen, 95 Cal. 184. The statute must in any event be proved as any other matter of fact. Whelan v. Kinsley, 26 O. S. 131.

⁸ Newborg v. Freehling, 48 Ill. 463.

⁹ Irwin v. Garetson, 1 C. S. C. R. 538.

¹⁰ Harrod v. Carder, 3 O. C. C. 479.

¹¹ Mudgett v. Clay, 31 Pac. Rep. 424; 5 Wash. 108.

CHAPTER 83.

STOCK AND STOCKHOLDERS.

Sec. 1151. Action to enforce statutory liability.	Sec. 1156. Action for recovery of unpaid assessment or instalment.
1152. Liability attaches when — Assignee.	1157. Petition for recovery of stock assessments or calls by corporation.
1153. Receiver may be appointed to enforce.	1158. Corporation not for profit— Trustees liable.
1154. Petition by judgment creditor to enforce stockholder's liability.	1159. Action to enforce stockholder's liability — Defenses.
1155. Petition by administrator to enforce stockholder's liability for a demand for unliquidated damages.	1160. Statute of limitations.
	1161. Answer of statute of limitations.

Sec. 1151. Action to enforce statutory liability.— The extent of the liability of stockholders, and the proper remedy for its enforcement, must necessarily depend upon the remedial systems of the various states. In Ohio they are liable in an amount equal to their stock,¹ and a stockholder or creditor may enforce the liability against all holders or owners of stock for the benefit of all creditors and against all of the stockholders.² An averment that each of the defendants, except the corporation, is the holder of a specified number of shares, is sufficient to show that they are stockholders.³ The amount

¹ R. S., sec. 3258.

² R. S., sec. 3260; *Umsted v. Buskirk*, 17 O. S. 113. The corporation should be made a party. *Id.* "Stockholders" applies to those appearing on the books and equitable owners as well. R. S., sec. 3259. A pledgee of stock does not by virtue of the pledge become a stockholder and liable to creditors in an action to enforce the statutory liability. *Henokel v. Mfg. Co.*, 39 O. S. 547; *Thompson, Stat.*

Liab., sec. 178; *Mills v. Stewart*, 41 N. Y. 384. The courts will look no further than the books of the company. *Id.*; *State ex rel. v. Ferris*, 42 Conn. 560. All owners of stock are necessary parties. *Bonewitz v. Bank*, 41 O. S. 78; *Wright v. McCormick*, 17 O. S. 86; *Brown v. Hitchcock*, 36 O. S. 667; *Wheeler v. Faurot*, 37 O. S. 26.

³ *Railroad Co. v. Smith*, 49 O. S. 219.

payable by each stockholder on all of the indebtedness must be determined, but cannot exceed the amount of the stock upon which he is liable.¹

In Ohio and other states the doctrine has been adopted that the word "debt," as used in the constitution, includes not only a debt arising upon contract, but also an amount for unliquidated damages as for tort, for the payment of which the statutory liability of a stockholder may be enforced.² It is said that the action is none the less an equitable one though made statutory.³ The liability of stockholders, being collateral, can be resorted to only when the corporation has become insolvent, or where payment cannot be enforced against it by the ordinary process of execution.⁴

In the absence of statutory enactment the general rule, by apparent weight of authority, is that corporate creditors cannot enforce the liability of stockholders until they have first exhausted their remedy against the corporation and its assets, that there must first be a judgment rendered against the corporation and execution thereon returned unsatisfied.⁵ But to this rule there is an exception. These steps are not considered necessary where the corporation has become wholly insolvent and ceased to do business, and has made an assignment or been placed in the hands of a receiver, in which case it is said that a suit may be commenced to enforce the stockholders' liability without having obtained a judgment and having an

¹ R. S., sec. 8260. As between stockholders and creditors, each stockholder is severally liable to all creditors; and as between themselves, each is bound to pay in proportion to his stock. *Umsted v. Buskirk*, 17 O. S. 113.

² *Rider v. Fritchey*, 49 O. S. 285-293, and cases cited.

³ *Zieverink v. Kemper*, 34 N. E. Rep. 250; 50 O. S. 208.

⁴ *Wehrman v. Reakirt*, 1 C. S. C. R. 280; *Wright v. McCormick*, 17 O. S. 86; *Hawkins v. Furnace Co.*, 40 O. S. 13. See *Kilgour v. Railway Co.*, 8 W. L. B. 23; *Baldwin v. Coal Co.*, 8 W. L. B. 296.

⁵ *Morgan v. Lewis*, 46 O. S. 1;

Ewing v. Sultz, 36 N. E. Rep. 179 (Ind., 1894); *Cook on S. & S.*, sec. 219. It cannot be enforced until there is some necessity therefor, as insolvency of the company or failure to collect by legal process. *Ladd v. Cartwright*, 7 Oreg. 329; *Harper v. Manufacturing Co.*, 100 Ill. 225; *Jackson v. Meek*, 37 Tenn. 69; 9 S. W. Rep. 225; *Nimick v. Iron Works Co.*, 25 W. Va. 184; *Barrick v. Gifford*, 47 O. S. 156. It is said that the suit is founded on a judgment against the corporation and not on the indebtedness itself, as the liability is secondary. *Henderson v. Turngren*, 35 Pac. Rep. 495 (Utah, 1894).

execution issued and returned unsatisfied.¹ The creditor may commence his action immediately upon the appointment of an assignee or receiver to wind up its affairs without waiting for final settlement. But in such case the court may withhold final judgment until the exact amount each stockholder should pay can be ascertained, or so mold its decree so as to require the several stockholders to pay their proportion of the liabilities remaining after the application of all the assets toward their satisfaction.² An action to compel the payment of unpaid subscriptions for stock and to subject the statutory liability of a stockholder may be joined in the same action by a judgment creditor.³ To maintain a suit to enforce the statutory liability of a deceased stockholder, it is not essential that a claim on account of such liability be first exhibited to his personal representative, as no steps could be taken by him which would render suit unnecessary.⁴ An infant having purchased stock during his infancy, who holds the same after his majority, is liable.⁵ In an action to recover an assessment from a stockholder on his statutory liability, the petition should contain a statement that the stockholder was such at the time the debt was incurred.⁶ While stockholders in a literary corporation acting within the scope of their powers are not liable for the acts of those who exceed the same, yet the act of incorporation can afford no protection from personal responsibility to those who exceed or assent to such unauthorized acts.⁷

Sec. 1152. Liability attaches when—Assignee.—The personal liability of stockholders attaches at the time a debt is contracted or the liability is incurred, and are not discharged by a subsequent assignment or transfer, but the assignee impliedly undertakes to indemnify or discharge the assignor from such liability.⁸ So that if by reason of the insolvency of the assignee the liability cannot be enforced against him, the assignor is then liable.⁹ A stockholder who has sold and transferred his stock to one who becomes insolvent is liable to creditors of a corporation for such portion only of the debts which were due while he held the stock as will be equal to the proportion which the stock assigned by him bears to the entire capital stock held by solvent stockholders within the jurisdiction,

¹ *Morgan v. Lewis*, 48 O. S. 1; *Barrick v. Gifford*, 47 O. S. 156; *Thompson, Stock. Liab.*, sec. 321.

² *Younglove v. Lime Co.*, 49 O. S. 663; *Morris v. St. Ry. Co.*, 2 Clev. 347.

³ *Warner v. Calendar*, 20 O. S. 190; *Morris v. Railr'd Co.*, 2 Clev. Rep. 347.

⁴ *Wanz v. Hotel Co.*, 1 O. C. C. 105. The representative is a necessary party.

⁵ *Hardman v. Railway Co.*, 15 W. L. B. 164.

⁶ *Hooker v. Kilgour*, 2 C. S. C. R. 350. A judgment by default cannot be rendered in the absence of such an averment. *Id.*

⁷ *Kearney v. Buttles*, 1 O. S. 362.

⁸ *Brown v. Hitchcock*, 36 O. S. 667.

⁹ *Brown v. Hitchcock*, *supra*; *Mason v. Alexander*, 44 O. S. 318.

liable for the same debts, to be ascertained at the time judgment is rendered.¹ The assignor has the right to bring in the assignee, as he is a necessary party to the final determination of the rights and liabilities of parties interested.² But as to all debts incurred subsequent to a *bona fide* transfer, the assignor cannot be held responsible therefor.³

Sec. 1153. Receiver may be appointed to enforce.— In Ohio a receiver may be appointed in an action to enforce the statutory liability of a stockholder to collect and distribute the fund, and may be authorized to enforce in his own name as receiver the payment of judgments rendered.⁴ But the statutory liability of a stockholder cannot be enforced by a receiver.⁵

Sec. 1154. Petition by judgment creditor to enforce stockholder's liability.—

The said plaintiff C. B. says that on the — day of —, 18—, he recovered a judgment against the said defendant, the T. Stove Company, a body corporate, duly organized and incorporated under the laws of the state of Ohio, in a certain action then pending in the common pleas court of — county, Ohio, in the sum of — dollars; that said judgment is still in full force, unreversed and unsatisfied, and that said plaintiff is now the owner thereof. The plaintiff further says that under and by virtue of an order of said court made in said action aforesaid, all the property, real and personal, of said defendant, the T. Stove Company, was sold by the sheriff of said county on the — day of —, 18—; that the proceeds of said sale were, after paying costs of suit and taxes, applied by order of said court towards satisfying the said judgment so obtained by said plaintiff against the said T. Stove Company as aforesaid, and that after applying said proceeds upon said judgment there remains due and unpaid thereof the sum of — dollars, with interest at — per cent. thereon from the — day of —, 18—. That execution for the unpaid balance of said judgment was, by said sheriff, returned unsatisfied for want of goods and property of the said T. Stove Company whereon to levy; and the plaintiff says that since said day, to wit, the — day of —, 18—, the said T. Stove Company has been wholly insolvent and without property or assets to satisfy the balance of said judgment aforesaid.

¹ Harpold v. Stobart, 46 O. S. 397.

⁴ Zieverink v. Kemper, 34 N. E.

² Wheeler v. Faurot, 37 O. S. 26.

Rep. 250; 50 O. S. 208.

³ Taylor v. Wheel Co., 9 Am. Law

⁵ See chapter on Receivers, sec.

Rec. 28; Van Demark v. Barons, 35

1008.

Pac. Rep. 798 (Kan., 1894).

The plaintiff says that he is the sole creditor of said T. Stove Company, as he is informed and believes, and that said judgment is the only indebtedness thereof. The plaintiff further says that said defendants, G. S., I. H. S., D. B., etc., subscribed for, were the owners of, and now hold, certain shares of the capital stock of the said T. Stove Company; that said certificates of stock were so held and owned by said defendants during the period in which the debt upon which the plaintiff's said judgment was rendered was contracted; and that said defendants were liable under the constitution and laws of Ohio to pay an amount equal to the total amount of the said shares of stock so held and owned by them as aforesaid in satisfaction of the plaintiff's judgment aforesaid against the T. Stove Company.

Wherefore the plaintiff prays that the court may ascertain and cause to be made parties hereto all stockholders of the T. Stove Company; that the court may ascertain and determine the amount of stock owned and held by each such stockholder respectively, and the times during which they respectively so owned and held such stock; that upon a final hearing of this cause the court may determine the amount in which each such stockholder is liable to this plaintiff by reason of his said judgment; and that the court may order and direct the payment of such amount by each such stockholder for the purpose of paying said judgment and the costs of this suit; and for such other relief as in equity the circumstances of the case may require.

J. F. K. and E. W. T.,
Attorneys for Plaintiff.

NOTE.—From *Bronson v. Schneider*, 49 O. S. 433. See R. S., sec. 3260.

Sec. 1155. Petition by administrator to enforce stockholder's liability for a demand for unliquidated damages.

[On or about the — day of —, 18—, letters of administration *de bonis non* on the estate of J. M. W., deceased, were, by the probate court of — county, Ohio, duly issued to the plaintiff, who thereupon duly qualified and entered upon the duties of said office. Plaintiff is still engaged in the administration of said trust.]

Plaintiff sues as well on behalf of all the creditors of the defendant, The F. Street Railroad Company, as on his own behalf.

The defendant, The F. Street Railroad Company, is a corporation duly incorporated under the laws of the state of Ohio, having a capital stock of \$—, divided into — shares of \$— each, and was such corporation prior to the indebtedness hereinafter described.

On or about the — day of —, 18—, by the consideration of the court of common pleas of — county, Ohio, plaintiff recovered a judgment against the said The F. Street

Railroad Company, in the sum of \$—— damages, and \$—— and —— cents costs of suit, and on or about the —— day of ——, 18——, execution was duly issued on said judgment to the sheriff of said county, who upon the —— day of ——, 18——, returned the same unsatisfied, in whole or in part, for want of goods or chattels, lands or tenements whereon to levy the same, or whereof to make any portion of said judgment, and said company in fact then had, and now has, no property subject to execution from which said judgment could be made.

[On the —— day of ——, 18——, by proceedings in aid of execution in the probate court of said county of ——, plaintiff received from one E. P., president of said company, the sum of \$—— and —— cents, which sum was applied toward the satisfaction of said judgment.]

Said judgment is still in force, unpaid and wholly unsatisfied with the exception of said \$—— and —— cents, and there is now due plaintiff on said judgment the sum of \$—— and —— cents, with interest from ——, 18——, together with \$—— and —— cents, costs of suit.

Said judgment was rendered on a liability which was incurred by said company on the —— day of ——, 18——.

[Plaintiff's cause of action, upon which said judgment was recovered, was a claim for damages for negligently causing the death of said T. M. W., as set forth in the petition in said cause.]

The other defendants, except the said The F. Street Railroad Company, were, at the time said judgment was rendered, and still are, stockholders of said corporation, and are owners of the following shares of stock respectively:

F. P., owning —— shares; A. C. D., —— shares; etc.

By reason of the premises the said individual defendants are liable to plaintiff and the other creditors of said corporation to an amount equal to the amount of stock owned by each.

Plaintiff is informed and believes, and on such information and belief states, that there are other stockholders liable for the debts of the corporation whose names are unknown to plaintiff, and plaintiff asks that said corporation may be compelled to disclose who are its stockholders and who were its stockholders at the time said liability was incurred, and set forth their names and the amounts due from each to the corporation, and the amount of said stock owned by each, and that when they are discovered they may be made defendants.

Wherefore plaintiff prays that the creditors of the company and the amount due each may be ascertained in such manner as the court may direct, and that all stockholders in arrears for subscriptions to stock may be required to pay the balance due from them respectively, and that each stockholder be required to pay his ratable proportion of any deficit re-

maining after the application of the assets to said debts to the amount of his stock, and for other relief.

C. E. B., Attorney for Plaintiff.

NOTE.—*Rider v. Fritchey*, 49 O. S. 285. The word "dues" as used in the constitution will include not only a debt arising on a contract but a demand for damages arising from tort, for which stockholders will be held liable. *Id.* This form may be modified to conform to any action other than for tort. See new law as to course to be pursued in case of inability to summon stockholders. 21 O. L. 88.

Sec. 1156. Action for recovery of unpaid assessment or instalment.—While it is a well-supported doctrine that no valid assessment can, in the absence of legislation or express agreement be made upon the subscriptions to the capital stock of a corporation until the whole stock has been subscribed, the rule always yields to a different understanding between the parties.¹ The collection may be enforced when the terms of subscription are in harmony with the statutory provisions.² Where suit is brought for the recovery of unpaid instalments which were made payable upon the call of the directors or other conditions, these facts must be set forth in the petition with certainty;³ and the right to recover does not accrue until such call has been made.⁴ Interest cannot be allowed upon any instalment already paid so as to extinguish the principal sum due.⁵

Sec. 1157. Petition for recovery of stock assessments or calls by corporation.—

Plaintiff is a corporation duly formed and organized under the laws of the state of Ohio for the purpose of [*state purpose*], and is located at ____.

That the authorized capital stock of said corporation is the sum of \$____, of which the sum of \$____ has been actually subscribed and taken, said stock being divided into ____ shares of \$____ each.

That on the ____ day of ____, 18—, the defendant became a subscriber to the stock of said corporation by signing the following stock subscription, to wit: [*Copy.*]

That the said defendant paid upon his said subscription to the stock of said company the amount required of him, to wit,

¹ *Emmitt v. Railroad Co.*, 81 O. S. 25, and cases cited; *Jewett v. Railway Co.*, 84 O. S. 61. payment must be fixed. *Ross v. Railroad Co.*, 6 Ind. 297; *Smith v. Railroad Co.*, 12 Ind. 61.

² *Jewett v. Railway Co.*, *supra*.

⁴ *Gibson v. Bridge Co.*, 18 O. S. 396.

³ *Penn. & Ohio Canal Co. v. Webb*,

⁵ *Wood v. Pearce*, 2 Disn. 411.

⁹ O. 136. The time and place of

the sum of \$——, and the certificate of said stock was on the —— day of ——, 18——, issued to him, and said defendant is now the owner and holder of —— shares of stock in said corporation.

That on the —— day of ——, 18——, the directors of said corporation at a regular meeting, by a resolution duly passed and entered upon their minutes, made a call for and levied an assessment upon all the stockholders in said corporation of \$——. [*State amount.*] That the amount so levied upon the defendant herein upon the stock held by him was the sum of \$——, due notice of which levy has been given to said defendant, and demand made for its payment, but no part of which has been by him paid, and there is therefore due from said defendant to plaintiff the said sum of \$——.

That plaintiff has complied with all the conditions required of it, and therefore asks judgment for the sum of \$—— against the said defendant.

Sec. 1158. Corporation not for profit — Trustees liable.

The trustees of a corporation not for profit are made personally liable for all the debts of the corporation which are contracted by them.¹ This liability, however, has been held to be collateral to the principal obligation of the corporation.² To hold a member of an incorporated religious society liable for its acts or debts, it should appear that he in some way sanctioned or acquiesced in the creation of the same.³ Where the capital of a corporation not for profit consists of real estate, evidenced by certificates of shares which are made to draw interest, an action cannot be sustained by a shareholder for the recovery of a money judgment for interest on his share.⁴ In an action on an indebtedness against such a corporation, an averment that a defendant was a stockholder at the time the debt was incurred, or subsequently, is sufficient without showing him to be such at the time of the filing of the suit.⁵

Sec. 1159. Action to enforce stockholder's liability — Defenses.— A suit to enforce the liability of a stockholder should be for the benefit of all the creditors, and the stockholder against whom the suit is brought has the right to insist that his co-stockholders be made parties, that contribution may be enforced, and that all rights may be determined in one action.⁶

¹ R. S., sec. 3261.

⁴ *Ohio College v. Rosenthal*, 48 O. S.

² *Wallbrecht v. Pucketat*, 9 W. L. 183.

B. 335.

⁵ *Kearney v. Buttles*, 1 O. S. 362.

³ *De Voss v. Gray*, 22 O. S. 159.

⁶ R. S., sec. 3260; *Umsted v. Bus-*

Where a defense is made that there are stockholders who have not been made parties and who have not paid their subscriptions, their names should be given.¹ Stockholders may in such actions plead any defense to judgment claims that are personal to themselves and which the company could not have pleaded.² But no act of a stockholder without consent of the creditor can release him from his liability.³ Nor can a creditor be defeated in his right against an individual stockholder because the company was defectively organized;⁴ nor is it a good defense that he became a stockholder after the liability sued upon was incurred;⁵ or that he was induced to take the stock by misrepresentations when the corporation was insolvent.⁶ Nor can he say that he never subscribed for the stock or had any in his possession, as he may have never subscribed for stock and yet be a stockholder by reason of the transfer of stock to him;⁷ nor will an extension of time by a creditor to the corporation release the individual liability.⁸ A stockholder can not set off any claim he may have against the corporation against his statutory liability.⁹

One who transfers his stock after a corporate debt has been incurred, is not relieved from liability therefor by an agreement for an extension of time for its payment, although such agreement was made by the corporation and creditor after such transfer, and without knowledge or consent of the transferrer.* Where a stockholder is entitled to the distribution from the trust fund, his indebtedness, if he is insolvent, may in equity be set off against his distributive share.†

Sec. 1160. Statute of limitations.—The statute of limitations commences to run against the statutory liability from the time of the insolvency of the corporation, at which time it is enforceable against the stockholder,¹⁰ and the action for its enforcement must be brought within six years from that time.¹¹

kirk, 17 O. S. 118; *Bullock v. Kilgour*, 89 O. S. 546. An equity exists among the stockholders that when one is sued alone he has a right to bring all in, and compel a general account. *Willis v. Reed*, 8 W. L. B. 79.

¹ *Hardman v. Railway Co.*, 15 W. L. B. 164.

² *Hardman v. Railway Co.*, 18 W. L. B. 264.

³ *Hager v. Cleveland*, 26 Md. 476.

⁴ *Heuer v. Carmichael*, 33 Ia. 288; *Ryan v. Railroad Co.*, 10 Am. Law Rec. 288.

⁵ *Railroad Co. v. Smith*, 49 O. S. 212.

⁶ *Ryan v. Railroad Co.*, 10 Am. Law Rec. 278.

⁷ *Hardman v. Railway Co.*, 14 W. L. B. 346.

⁸ *Taylor v. Wheel Co.*, 9 Am. Law Rec. 28.

⁹ *Hardman v. Railway Co.*, 15 W. L. B. 164.

¹⁰ *Hardman v. Railway Co.*, 15 W. L. B. 164.

¹¹ *Hawkins v. Furnace Co.*, 40 O. S. 507.

* *Boice v. Hodge*, 51 O. S. 236.

† *King v. Armstrong*, 50 O. S. 222.

Sec. 1161. Answer of statute of limitation.—

The defendants, A. E. M. and S. S. M., for their answer to the petition of plaintiff filed herein, say: That the judgment against the — Company was rendered for causes of action which had accrued before the — day of —, 18—. That ever since said day said company has been insolvent. And that the cause of action in the petition set forth did not accrue within six years next before this action was begun.

Defendants for a second defense herein say that they deny that they or either of them were owners or holders of stock in said company at the time the debt mentioned in said petition accrued.

J. T. M.,

Defendants' Attorney.

NOTE.— An action to enforce the statutory liability must be brought within six years. *Hawkins v. Furnace Co.*, 40 O. S. 507.

Sec. 1161a. Decree for liability can not be subsequently contested.—A decree in a suit for the enforcement of the statutory liability of stockholders can not be contested in any subsequent proceeding so long as the judgment remains in force. Therefore, in proceedings thereafter to carry such judgment into execution, no further inquiry into any question of fact involved can be made; and a valid assessment can not be made against a stockholder for any greater number of shares than was made in the judgment.¹

¹ *B. & O. R. R. Co. v. Smith*, 54 O. S. 562.

CHAPTER 84.

STREET RAILWAYS.

Sec. 1162. Introductory.

1163. Petition for injury to passenger while alighting from street-car, caused by suddenly starting car.

1164. Petition for injury to a person driving wagon in street.

Sec. 1165. Petition by foot-traveler against street railway for negligently leaving ditch in street uncovered.

1166. Petition by administrator for injury to intestate from car running off track.

1167. Answer to petition for injury while alighting from car.

Sec. 1162. Introductory.— As questions of negligence with reference to the subject of street railways are not materially different from those involved in other subjects, at least so far as pleading is concerned, reference is therefore made to those chapters where the subject of negligence is specially treated.¹

Sec. 1163. Petition for injury to passenger while alighting from a street-car, caused by suddenly starting car.—

The plaintiff says that the said defendant is a corporation duly organized under the laws of the state of Ohio.

The plaintiff further says that at the time of the happening of the grievances hereinafter set forth the said defendant was, and for some years previous thereto had been, operating a street railroad in the city of — for the purpose of carrying passengers in its cars upon many of the streets in said city, and, among others, — street [*the place of accident*]. That for the purpose of laying its tracks in the streets of said city and operating said street railroad said defendant had, prior to the laying down of said tracks and the commencement of the operation of said railroad, procured from the said city of — a franchise and the right to lay down said tracks in the streets of said city, which franchise and rights were granted to said defendant by said city upon certain conditions and obligations which the said defendant agreed to observe and perform in operating said railroad and carrying passengers upon the same.

¹ See chapters 68-66.

The following is one of the conditions upon which said franchise and the right to operate said railroad in the streets of said city of A. by said defendant was granted by said city: [*Give substance of ordinance.*]

Subsequently, on the — day of —, 18—, the said city council of the city of A. passed an ordinance which provided in substance that [*give substance of ordinance*]. Said last above-mentioned ordinance applied to said defendant and the operation of said railroad.

Plaintiff says that all of said ordinances were in full force and effect in said city at the time of the happening of the grievances hereinafter stated.

Plaintiff further says that on the — day of —, 18—, she paid for and took passage upon one of the cars of the defendant upon said railroad on — street, and was carried and conveyed in said car from said — street, on — street, to — street, her destination, when she notified the conductor on said car that she wished to leave the same, whereupon said car was stopped, when this plaintiff immediately arose from her seat, stepped to the door, which was opened, and stepped upon the platform and one of the steps of said car for the purpose of leaving the same; that before she had time to step off from said car, the same was immediately started before she had time to get off from the same, whereby this plaintiff was violently thrown upon the paved street and her clothing was caught and held by some portion of said car, and said car being in motion she was dragged for several feet; by reason of which this plaintiff was caused great and irreparable injury, severely bruising her thigh and head, and producing great shock to her entire nervous system and concussion of her brain and spine, all of which injuries were caused and done by the said defendant by reason of the negligence, carelessness, default and wrongful acts of the said defendant, the — Company, by its officers, agents, employees and servants, whose names are unknown to this plaintiff [and without fault on her part]. Whereby, by reason of said injuries so caused as aforesaid, this plaintiff has suffered, and still is suffering, physical pain and anguish; that she has been unable ever since said — day of —, 18—, to attend to her business or perform any labor whatsoever. Plaintiff says that she is a — [*state occupation*], and was enabled to earn, before her injuries aforesaid, — dollars per month, and were it not for said injuries she would have continued to earn — dollars per month, and that she will forever after be unable to follow her profession [*or, business*] as —, or perform any kind of work, by reason of the injuries received as aforesaid.

Plaintiff says that by reason of the premises aforesaid she has been damaged by the said defendant in the sum of — dollars.

Wherefore the plaintiff prays judgment against the said defendant for the sum of — dollars, with interest from the — day of —, 18—.

NOTE.— From *Akron Street R. R. Co. v. Davis*, Supreme Court, unreported, affirming judgments of lower courts in favor of Davis, 28 W. L. R. 348.

Consult the following cases on the question of alighting from moving cars: *Baltimore, etc. Road v. Leonhardt*, 66 Md. 70; *Ganley v. Brooklyn City Ry. Co.*, 7 N. Y. Supp. 854; *Munroe v. Third Ave. R. R. Co.*, 50 N. Y. Super. 114; *Chicago City Ry. Co. v. Mumford*, 97 Ill. 560; *North Birmingham St. R. R. Co. v. Calderwood*, 89 Ala. 247; *West End & Atlanta St. Ry. Co. v. Mozeley*, 79 Ga. 468; *Conley v. Forty-Second St. M. & St. N. Ave. Ry. Co.*, 2 N. Y. Supp. 229. When incumbered by a bundle, *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600.

As to children: *Wyatt v. Citizens' Ry. Co.*, 55 Mo. 485; *Mettlestadt v. Ninth Ave. R. R. Co.*, 4 Robt. 877; *Lovett v. Salem & South Danvers R. R. Co.*, 9 Allen, 557; *Saffer v. D. D. E. B. & B. R. R. Co.*, 5 N. Y. Supp. 700.

Sec. 1164. Petition for injury to a person driving wagon in street.—

That the said defendant is a corporation duly created and existing under the laws of Ohio, and engaged in operating and running street-cars, operated by electricity, for the purpose of carrying passengers for hire upon and over the streets of the city of —.

That on the — day of —, 18—, the said defendant was the owner of a certain street-car, propelled by electricity, which it was by its servants running and operating upon its railway track upon — street in said city, and the plaintiff was lawfully upon said street with his team and wagon engaged in hauling [*state what*] thereon. That the streets were so slippery that it was difficult for plaintiff to turn off said track to get out of the way of the said car as it was approaching. That the motor-man in charge of said car saw the plaintiff trying to get off said track, and the difficulty he had in so doing, in ample time to have stopped his car and have prevented the injury to him, but that said defendant, by its said servants, did not stop its car as it should have done, but that the defendant, by its servants, so negligently drove, run and conducted said car numbered — that the same was thereby run and was driven against the plaintiff and seriously and permanently injured him. [*State special damages.*]

[*Prayer.*]

NOTE.— This was held to state a cause of action in *Will v. West Side R. Co.*, 84 Wis. 42. The plaintiff could not be charged with negligence in driving on or in getting off the track. *Id.*

Sec. 1165. Petition by foot-traveler against street railway for negligently leaving ditch in street unprotected.—

[*Caption and averment of corporate character.*]

That on or about the — day of —, 18—, the said defendant did, by its agents and servants, dig and open a ditch

or trench on E. street and M. avenue, at the point where they intersect, both being public streets, in the city of C., — county, Ohio, and did then carelessly and negligently permit said ditch or trench to remain open and uncovered, and without placing any light of warning or barrier at or near the same; and plaintiff further says that in consequence of the negligence and carelessness aforesaid of the defendant, in passing along said streets in the early evening of said day, he accidentally fell into the said ditch or trench and broke his right leg, and was badly hurt, whereby he became lame and diseased, and so remained up to the present time, and still is and will be permanently lame and weakened. That he has been ever since said injury, and still is, prevented from attending to his necessary and ordinary business and labor, to his loss and damage to the present time in the sum of \$—, and has been put to and incurred great expense, to wit, the sum of \$—, for medical services and attendance in and about trying to get healed and cured of his said injury, and that he has been put to great pain and suffering, and has received permanent injury from said fall, and that he has thereby suffered further damages in the premises in the sum of \$—, for which he asks judgment.

NOTE.— From *Street R. R. Co. v. Nolthenius*, 40 O. S. 376.

Sec. 1166. Petition by administrator for injury to intestate from car running off track.—

[Averment of representative capacity.]

The plaintiff says that the defendant is a common carrier of passengers, in the city of —, by means of street railway cars, drawn on the defendant's railway (by horses, electrical or cable power); that the plaintiff's intestate, on or about the — day of —, 18—, at the request of the defendant, took a seat in one of the cars of the defendant, to be conveyed, for a reasonable sum paid to defendant, on said railroad, in said city of —, whereby it became the duty of said defendant to convey the plaintiff's intestate safely on said car. Yet the defendant, not regarding its duty in that behalf, wholly neglected so to do, and by its agents and servants so negligently, carelessly and unskilfully managed said car, and the horses which drew the car, in which plaintiff was seated, and the said railway of the defendant was so unskilfully and imperfectly built by the defendant, and was suffered by the defendant to be in so defective and dangerous a condition, that said car several times ran off the tracks of said defendant, and was dragged over the pavement of the street, and was so jolted as to cause injury to plaintiff's intestate, who during all this time was in the exercise of due care and diligence; that by reason of said negligent and improper management

by said defendant, its agents and servants, the said plaintiff's intestate was severely injured in her body, from which injury she died.

[*Prayer.*]

NOTE.—From *Holland v. Lynn & Boston R. R. Co.*, 144 Mass. 425, under special statute.

Sec. 1167. Answer to petition for injury while alighting from car.—

Defendant for answer to plaintiff's petition herein admits each and every allegation of said petition up to and including the words: "——." And as to all other allegations of said petition, the same are hereby denied, and such denial is only qualified as hereinafter set out.

Defendant says that the plaintiff, at the time and place stated in said petition, not only stepped upon the platform and one of the steps of the car, in which she had been riding, for the purpose of leaving the same, but while said car was still standing she stepped to the ground with both feet, so that before said car was again started, after it had stopped at —— street, as alleged in the petition, plaintiff was entirely off and away from said car.

Defendant admits that after having so stepped on the ground, the plaintiff fell and was somewhat injured by such fall, but denies that such injuries were as serious as averred in the petition.

Defendant further says that whatever injuries plaintiff sustained were not caused by any fault or negligence on the part of the defendant or by any violation of any of its obligations, but it says that if such injuries were caused by the negligence of anybody, they were caused wholly or in part by the negligence of plaintiff.

Wherefore defendant prays to go hence with his costs.

CHAPTER 85.

SUBSCRIPTION.

Sec. 1168. Contract of subscription.	Sec. 1172. Petition for subscription
1169. Action on subscription.	• for erection of building.
1170. Action on conditional subscription.	1173. Petition to collect subscription to capital stock of corporation — By receiver.
1171. Petition on a subscription to educational institution.	1174. Subscription — Defenses.

Sec. 1168. Contract of subscription.— A contract of subscription is usually in writing, but may arise from the stockholders' implied consent to the provisions of the statute.¹ A recovery may, in the absence of facts creating an estoppel against the promisor, be had upon a verbal promise to take the shares of stock.² The contract cannot be rescinded by forfeiting any payments made thereon, but the corporation may resort to an action on the promise.³ The subscription being but a contract, the subscriber does not become a stockholder and entitled to a certificate until he has paid for the same.⁴ But when payment is made he becomes a shareholder and entitled to all the privileges as such, whether a certificate is issued or not.⁵ A subscriber becomes liable for the debts of the company to the nominal amount of stock subscribed by him, even though he has not paid any portion of the subscription or performed any act as a stockholder.⁶ Ordinarily a promise to make a *covenant* may be revoked at any time before payment, and there is no mutual promise which constitutes a consideration in a promise to contribute to a fund for educational purposes, which contains a condition that the same is to be applied to certain purposes and is accepted.⁷ But it

¹ *Baldwin v. Coal Co.*, 8 W. L. B. 296.

² *Fanning v. Insurance Co.*, 37 O. S. 339.

³ *Klein v. Railway Co.*, 13 Ill. 514.

⁴ *Balt. City Pass. Ry. Co. v. Hambleton*, 26 Atl. Rep. 279 (Md., 1893).

⁵ *Fulgam v. Railroad Co.*, 44 Ga. 597; *Johnson v. Railroad Co.*, 54 N. Y. 416.

⁶ *Spear v. Crawford*, 14 Wend. 20.

⁷ *Johnson v. University*, 41 O. S. 527.

becomes a legal and enforceable obligation as soon as any part of the agreement has been carried out by any acts performed by the donee,¹ or any liabilities have been incurred on the faith of it.² A subscription for the purpose of enabling a public improvement is a valid and enforceable contract.³ A conditional subscription is revocable at any time before delivery and acceptance, and is revoked by the death of the subscriber.⁴ Where a conditional subscription is made to a corporation the relation of subscriber to the company as stockholder, so that the same may be enforced, does not arise until the performance of the condition.⁵ A subscription for the construction of a road will be considered as a contract to pay the person constructing the same for work and labor.⁶

Sec. 1169. Action on subscription.—In an action on a stock subscription for the recovery of an instalment the petition must show that the company is authorized to have a capital stock and to take subscriptions.⁷ A subscription may be enforced after the statutory requirement as to the amount to be subscribed has been complied with, even though the whole amount of capital stock has not been taken.⁸ The remedy adopted for the enforcement of subscriptions of stockholders varies. Some courts hold that an action at law may be brought directly by the creditors, while others that a suit in the nature of a creditor's bill is the appropriate remedy.⁹ Under the code it becomes an ordinary suit upon an instrument for the payment of money, and a copy of the subscription when unconditional may be inserted in the petition; and it be conditional, it then becomes an evidence of indebtedness and should be attached.¹⁰ It should be averred that the corporation has issued or offered to issue the stock

¹ *Farmers' College v. McMicken*, 2 Disn. 495.

² *Sutton v. Otterbeim University*, 7 O. C. C. 843.

³ *Commissioners v. Perry*, 5 O. 57.

⁴ *Wallace v. Townsend*, 43 O. S. 537.

⁵ *Elder v. Railway Co.*, 1 O. C. C. 256.

⁶ *Sperry v. Johnson*, 11 O. 452.

⁷ *Minneapolis H. Works v. Libby*, 24 Minn. 327.

⁸ *Jewett v. Railway Co.*, 34 O. S. 601. A suit in equity may be sustained against a stockholder for an unpaid subscription of stock, even though such stockholder has not paid the statutory amount required of him.

⁹ *Cook on S. & S.*, secs. 203, 204, and cases cited.

¹⁰ See *ante*, secs. 57, 58; *Hudson v. Railroad Co.*, 4 G. Greene, 152; *Smith v. Johnson*, 57 O. S. 486; 39 W. L. B. 199.

to the defendant.¹ Where one sells shares of capital stock the certificate of which has not been issued, and agrees to give the purchaser a certificate when he gets it, the latter is not bound to pay an assessment thereon before the same is issued.² Where it is made subject to a call, no action can be maintained thereon in the name of the company until such a call has been made.³ An allegation that the directors required the subscription to be made in instalments of certain amounts and at a certain time and place is material.⁴ Where a corporation has been regularly organized, creditors who have dealt with it may enforce the payment of stock subscription, although the subscribers may have notified the company that they would not be liable, upon the assumption that the corporate existence was without authority of law.⁵ Where suit is brought upon an unpaid subscription against the estate of the subscriber, it should be alleged that the claim has been presented as is required in ordinary claims against the estate of a decedent.⁶ An action against a guarantor and subscriber of a corporation may be joined in the same petition whether the liability be joint, or joint and several, where it is based upon the same instrument.⁷ A subscription to stock creates a debt against the subscriber, from which he cannot relieve himself by an assignment or transfer made without the sanction of the directors.⁸ The payment of an unpaid balance upon a stock subscription to an insolvent corporation may be enforced by a creditor's bill.⁹

Sec. 1170. Action on conditional subscription.—The provisions of the code¹⁰ as to pleading performance of conditions precedent in contracts apply to conditional stock subscriptions. In such actions it will be sufficient for the corporation or

¹ *St. Paul, etc. R. R. Co. v. Robbins*, 23 Minn. 489.

² *Brigham v. Mead*, 10 Allen, 245. In such a case there must be an averment of readiness and willingness to issue and deliver the certificate of stock. If the subscriber cannot get the stock, the payment of money cannot be enforced. *James v. Railroad Co.*, 2 Disn. 261.

³ *Lamar Ins. Co. v. Moore*, 84 Ill. 575.

⁴ *Railroad Co. v. Hall*, 26 O. S. 810.

⁵ *Gaff v. Flesher*, 83 O. S. 107.

⁶ *College v. Higgins*, 16 O. S. 20.

⁷ *Neil v. Trustees*, 81 O. S. 15.

⁸ *Graff v. Railroad Co.*, 31 Pa. St. 489.

⁹ *Johnson v. Paper Co.*, 25 Atl. Rep. 560; 153 Pa. St. 189.

¹⁰ O. Code, sec. 5091.

the plaintiff to aver that it has duly performed all the conditions on its part to be performed.¹ A subscription for the endowment of an educational institution may be enforced when the thing for which the subscription is made has been performed.² But it cannot be enforced if no liability has been incurred upon the faith of it.³ In an action on a subscription of stock of a railroad company, made upon condition that it shall be paid when called for, or that it shall be expended upon a certain line of railroad to be located, the petition must aver that the road has been constructed upon the line designated, or allege readiness on the part of the company to expend the money according to the condition.⁴ A conditional subscription becomes an absolute one upon compliance with the provisions.⁵ But the ownership of such a subscription will not pass to a grantee of a railroad company; hence the performance of conditions by the grantee will not fix the liability of the subscriber.⁶ A condition attached to a subscription is waived by the payment of the first instalment thereon, and by voting the whole stock at an election of officers.⁷ A subscription to the capital stock of a railroad corporation made upon a condition may be enforced against the subscriber after the same has been fully complied with, although when the subscription was made the company had not expended the amount required by statute in the construction of its road, nor obtained the requisite *bona fide* subscription to its capital stock as required by law.⁸

Sec. 1171. Petition for subscription to educational institution.—

That the plaintiff is a corporation duly created, organized and existing under the laws of Ohio, for educational purposes.

That on or about —, 18—, the said — academy was and for a long time had been heavily in debt; that it owed the sum of \$—, and its real estate was heavily mortgaged,

¹ O. Code, sec. 5091. See *ante*, sec. 59.

² *Irwin v. Webster*, 7 O. C. C. 269; *Sutton v. Otterbein University*, 7 O. C. C. 843.

³ *Sutton v. Otterbein University*, *supra*.

⁴ *Trout v. Sarchett*, 10 O. S. 241.

⁵ *Chamberlain v. Railroad Co.*, 15 O. S. 225; *Railroad Co. v. Smith*, 15 O. S. 328.

⁶ *Railroad Co. v. Hinesdale*, 45 O. S. 556; *Dungan v. Safford*, 41 O. S. 15.

⁷ *Railroad Co. v. Hatch*, 1 Dian. 84.

⁸ *Armstrong v. Karshner*, 47 O. S. 276.

and the creditors were urging the payment of their claims against the said academy.

That to relieve the said academy from its financial embarrassments, several of its friends and patrons, in —, 18—, proposed by subscription, by their several promissory notes, to raise a sufficient sum of money to pay, as nearly as possible, the then existing indebtedness of said academy, and to relieve it from its embarrassments.

Plaintiff states that it thereupon procured a number of persons, including this defendant, to execute their several promissory notes in writing which were delivered to plaintiff. [*If for unconditional payment it may be alleged:*] That this defendant executed and delivered to plaintiff his note for the sum of \$—, of which the following is a copy: [*Copy.*] [*If it is dependent upon conditions it should be alleged:*] That the defendant thereupon executed and delivered to plaintiff his certain promissory note, dated —, 18—, for the sum of \$—, whereby defendant agreed to pay to plaintiff or order the said sum of \$— on the — day of —, 18— (a copy of which note is attached as an exhibit only).

That when said note became due, to wit, —, 18—, payment thereof was duly demanded, but was refused, and there is therefore due from said defendant upon said note the sum of \$—, no part of which has been paid.

Plaintiff further alleges that after the said several persons, including the defendant herein, had so executed their several promissory notes, this plaintiff, in order to obtain immediate relief from its said indebtedness, and on the faith of the note or obligation of the defendant herein and other persons so existing in favor of plaintiff, did borrow the sum of \$— from one J. S., executing and delivering to said J. S. a mortgage upon its real property to secure the same. Plaintiff thereupon used the sum of \$— so borrowed as aforesaid in payment of its said indebtedness.

Wherefore plaintiff asks judgment against the said defendant for the sum of \$— and interest due thereon.

Sec. 1172. Petition for subscription for erection of building.—

That on or about —, 18—, the plaintiff and defendant entered into an agreement in writing, wherein and whereby the defendant agreed and promised to pay to D. & R. the sum of \$— in consideration of the construction by said D. & R. of a certain building to be erected by the city of — in accordance with certain plans and specifications in said contract described and set forth, the said sum of \$— to be paid by the terms and conditions of said contract upon the completion of said building. [A copy of said contract is attached hereto as an exhibit only.]

That the said D. & R. completed the construction of said building according to and as specified in said contract, and have fully and fairly performed and fulfilled their part of said contract to be performed.

There is therefore due to the said D. & R., plaintiff herein, the sum of \$—; that the said sum became due and payable, according to said contract, on or before the — day of —, 18—, when payment thereof was to be demanded, which was duly made, but payment was refused.

Plaintiff therefore asks judgment against the said defendant for the sum of \$—.

Sec. 1173. Petition to collect subscription to capital stock of corporation — [By receiver].—

[Plaintiff says he was on the — day of —, 18—, duly appointed receiver of The C. S. M. Company, a corporation organized under the laws of Ohio, by the court of common pleas of — county, Ohio, in a cause therein pending, entitled — —, plaintiff, against The C. S. M. Company, which cause was numbered — on the docket of said court. That said plaintiff was, by virtue of the order of appointment, duly authorized to administer all of the property and assets of said corporation, and to sue for and enforce the collection of any unpaid stock subscription due and payable from stockholders of said corporation, and to carry out and enforce all contracts and collect all outstanding claims due said corporation.]

Plaintiff states that the said The C. S. M. Company is a corporation duly organized under the laws of the state of Ohio, for the purpose of manufacturing sheet-metal products and carrying on a general manufacturing business.

That on the — day of —, 18—, the defendant with certain other persons associated themselves together for the purpose of organizing said corporation, and made and subscribed a certain subscription to the capital stock of said corporation, to wit: [*Copy subscription, with defendant's name signed.*]

That the authorized capital stock of said corporation was \$—, divided into — shares of \$— each, the sum of \$— being actually subscribed, of which the defendant, by his said subscription, agreed to take and pay for — shares thereof of \$— each, amounting to \$—, of which sum the defendant paid to said company \$— on the — day of —, 18—.

That on the — day of —, 18—, the directors of said corporation made a call for an assessment of — per cent. upon the stock of the stockholders of said company, including this defendant, and further calls on each and every thirtieth day thereafter until the stock subscriptions were all

paid, of all of which defendant was duly notified, but failed and refused to make any further payments, although demand therefor was made upon him, and an offer made to issue the certificates of stock in said corporation to said defendant.

[*Where certificate has not been issued:*]

[That plaintiff, as such receiver aforesaid, has no power to issue or tender to said defendant any certificates of the stock by him subscribed, but avers that said corporation has incurred indebtedness, and creditors have dealt with and have otherwise been induced to subscribe for the capital stock of said company, on the faith of said subscription by said defendant.]

Plaintiff states that he has [in his capacity of receiver] demanded payment of said defendant of the amount due upon his subscription aforesaid, which he has failed and refused to pay, and there is now due from said defendant thereon the sum of \$—, for which plaintiff asks judgment against said defendant, with interest thereon at — per cent. per annum from the — day of —, 18—.

NOTE.— This may be varied in a suit by the corporation itself or an assignee.

Sec. 1174. Subscription—Defenses.—A defendant in an action on a stock subscription cannot be permitted to set up any defects or irregularities in the articles of incorporation.¹ Nor can an action to recover on subscription to an increase of stock for the purpose of paying debts be defeated by showing irregularities in the proceedings to increase, where the subscriber had knowledge of the facts and acquiesced therein until the company became insolvent.² But a conditional subscriber to a railroad company who has no knowledge of a consolidation of such company with another may, in an action by the consolidated company, set up a defense that the new company is without corporate existence.³ A defendant cannot show that the corporation was guilty of any violation of law,⁴ or that the subscription was made prior to the filing of the articles of the corporation, where the stock subscription book shows that it was made subsequent thereto,⁵ or that it was agreed among the promoters that the company was organized for an illegal purpose.⁶ Where debts and liabilities

¹ Mullen v. Driving Park, 64 Ind. 202.

² Royce v. Tyler, 2 O. C. C. 175.

³ Globe Sewer Pipe Co. v. Otis, 22

⁴ Clarke v. Thomas, 34 O. S. 46.

N. Y. S. 411; Vinegar Co. v. Schlegel,

⁵ Railroad Co. v. Stout, 26 O. S. 241.

22 N. Y. S. 407.

⁶ Vorhees v. Receivers, 19 O. 463.

have been incurred on the faith of a subscription in writing, its collection cannot be defeated on the ground of a supposed want of legal consideration.¹ And where a person became a subscriber in good faith and has induced others to become subscribers on the faith of his subscription, any subsequent alteration of his subscription without the knowledge of others will not affect the liability of those induced to subscribe.² But a secret agreement to alter a subscription by reducing the amount thereof is a fraud upon other subscribers and void. Hence such a void alteration cannot be urged as a defense by other subscribers.³ No recovery can be had upon a subscription to the stock of a railroad company altered after its execution without the consent of the subscribers, unless it be shown that the same was not fraudulently made.⁴ Nor can recovery be had where a railroad company has changed the termini of its road,⁵ although such a change, made under authority of law, will not affect a subscription.⁶ Stockholders are not released by a change made in the line of a road so as to pass through a county not named in the articles of incorporation, but will only be released when the line is diverted from the county named.⁷ An answer by a defendant admitting that he had been a stockholder, but disclaiming any knowledge of the debt, which he denies, is an admission that he was a stockholder at the time of contracting the debt.⁸ An ouster of a corporation in a proceeding in *quo warranto* is no defense to a suit by a creditor to enforce the payment of an unpaid stock subscription.⁹

¹ College v. Higgins, 16 O. S. 20.² Jewett v. Railway Co., 84 O. S.601.
³ Jewett v. Railway Co., 84 O. S.⁷ Armstrong v. Karshner, 47 O. S.601.
⁵ Jewett v. Railway Co., 84 O. S.⁸ Herbert v. Uhl, 20 N. Y. S. 743.⁴ Berry v. Railway Co., 26 O. S. 678.⁹ Rowland v. Furniture, 88 O. S.⁶ Railroad Co. v. Elliott, 10 O. S. 57. 269; Gaff v. Fleisher, 38 O. S. 115.

CHAPTER 86.

TAXES.

Sec. 1175. Action to restrain levy or collection.	Sec. 1178. Action to recover taxes due.
1176. Petition to enjoin collection of taxes — Formal parts.	1179. Petition by county treasurer for collection of taxes.
1177. Action to recover taxes illegally paid.	1180. Petition for collection of taxes asking for the sale of personal property.

Sec. 1175. Action to restrain levy or collection.— Courts are given power by statute to restrain an illegal levy or collection of a tax within one year after the same is collected.¹ Such an action must be brought against the corporation or person for whose use or benefit the levy or collection was made; and if the county auditor collects the same he must be joined.² An action to enjoin the collection of taxes and assessment must be brought against the officer whose duty it is to collect the same.³ Under the Kansas code, any one or more of a number of persons whose property is affected by an illegal assessment may maintain an action to enjoin the collection without joining others.⁴ Before an injunction can be granted to restrain a levy or collection of a tax some step must be taken in that direction by the collecting officers.⁵ It will not be granted to restrain the sale of property where the petition avers that a portion does not belong to the plaintiff.⁶ Nor will the collection of a tax be restrained upon the ground of a mere irregularity in the proceedings.⁷ A tax levied under an unconstitutional act may be enjoined.⁸ A

¹ R. S., sec. 5848.

⁶ Black v. Boyd, 155 Pa. St. 163.

² R. S., sec. 5849.

⁷ Kansas Mut. Life Ass'n v. Hill, 83

³ R. S., sec. 5850; Herzberg v. Willey, 13 W. L. B. 384 (Muskingum Co. C. P.).

Pac. Rep. 300 (Kan., 1898); Hixon v. Oneida Co., 83 Wis. 515; 53 N. W. Rep. 445 (1892).

⁴ Gilmore v. Fox, 10 Kan. 509.

⁸ Counterman v. Dublin Tp., 88 O. S.

⁵ Andrews v. Love, 46 Kan. 264; 515.

W. & K. C. Bridge Co. v. Board, 10 Kan. 326. 1252

person seeking to enjoin the collection of taxes who admits a portion to have been legally levied must pay or tender the same,¹ and must allege payment or make a tender of the portion admitted in his petition;² the court will restrain the collection of the illegal portion only upon the condition that the valid portion is paid.³ Only so much, however, need be paid or tendered as the plaintiff, as matter both of fact and law, concedes to be due.⁴ In an action to enjoin a county treasurer from collecting a tax levied for school purposes, the school district is a necessary party.⁵

The principles of equitable estoppel apply to remedies with reference to the prevention of a levy or collection of a tax, and a person cannot invite and encourage an improvement irregularly made and then ask a court of equity to protect him by an injunction from the consequences of the levy.⁶ An injunction is also the proper remedy to prevent a county auditor from placing on the tax duplicate non-taxable property,⁷ and to restrain the collection of an illegal tax which creates a cloud upon a title.⁸ So a debtor may be enjoined from assessing a tax against property erroneously placed on the duplicate.⁹ The rule is laid down in Kansas that a person cannot enjoin the levying or collection of a tax unless he has property which will be affected thereby.¹⁰ A petition asking for an injunction against the levy or collection of a tax should not be vague or indefinite in its allegations.¹¹ But in an action to enjoin the collection of illegal taxes the petition need not aver that the plaintiff has property out of which the taxes can be collected, as his right to relief does not depend upon the extent of his possessions.¹² An answer to a suit to enjoin the collection of an assessment alleged to have been illegally made, claiming that the plaintiff had full knowledge of the commencement and progress of the

¹ R. S., sec. 5851.

² *Huntington v. Palmer*, 7 Sawy. 355; *Frazer v. Seibern*, 16 O. S. 614.

³ *Ehni v. Columbus*, 8 O. C. C. 498.

⁴ *Adams Express Co. v. Ratterman*, 11 W. L. B. 288 (C. S. C. R.).

⁵ *Hayes v. Hill*, 17 Kan. 360.

⁶ *Stewart v. Board*, 45 Kan. 708.

⁷ *Hawk v. Bonn*, 6 O. C. C. 452.

⁸ *Bramwell v. Guheen*, 29 Pac. Rep. 110 (Idaho, 1892).

⁹ *Jones v. Davis*, 35 O. S. 474.

¹⁰ *W. & K. C. Bridge Co. v. Board*, 10 Kan. 326.

¹¹ *King v. Cappeller*, 42 O. S. 218.

¹² *Commissioner v. Lang*, 8 Kan. 284.

work, and made no objections, is not good unless it also appears that such work was done under authority, or that he knew the cost was to be charged to him.¹

Sec. 1176. Petition to enjoin collection of taxes — Formal parts.—

That the defendant — county is a duly organized county of the state of Ohio, and the defendant C. E. is the duly elected and qualified treasurer thereof.

That the plaintiff is the owner of the following real estate situate in —, in said county, and described as follows: [*Description.*]

[*Here state the complaint as to illegal taxes.*]

That the defendant C. E., treasurer of said county, is proceeding to advertise plaintiff's lands for sale for the payment of the taxes so illegally assessed, and will sell the same unless restrained by order of this court. That the plaintiff has no adequate remedy at law for relief against the said illegal assessment of taxes pretended and claimed to be charged against plaintiff's said lands and for which said defendant threatens to sell the same.

That plaintiff has tendered to the defendant as such treasurer the sum of \$—, the amount admitted by plaintiff to be legally due from him, and now tenders the same and is ready and willing to pay said sum, but that defendant refuses to accept the same, without the payment of the sum which plaintiff claims to be illegally assessed.

Plaintiff therefore prays that the defendant may be restrained and enjoined from collecting [*here state precise amount sought to be restrained from collection*].

Sec. 1177. Action to recover taxes illegally paid.—An action to recover taxes illegally paid must be brought against the officer who made the collection; or, if dead, against his personal representative; and when not collected on the county duplicate, the corporation making the levy should be joined.² It is an elementary principle that money voluntarily paid cannot be recovered by the person paying, and that to warrant recovery it must have been involuntarily paid. This rule will extend to the payment of an illegal tax.³ A general rule as to when a payment is voluntary or involuntary can hardly be formulated, though it is well settled that payment under protest is not involuntary.⁴ It has been held that money paid

¹ *Gilmore v. Fox*, 10 Kan. 509.

also, *Wiesmann v. Brighton*, 88 Wis. 550.

² R. S., sec. 5850.

³ *Whitbeck v. Minch*, 48 O. S. 210; *Wilson v. Pelton*, 40 O. S. 306. See,

⁴ *Whitbeck v. Minch*, 48 O. S. 210.

under protest by one engaged in the sale of liquor, in order that he may continue in business, may be recovered back.¹ To constitute an involuntary payment, it should be made to release the person or property from detention, or to prevent a seizure, without resorting to an action of law;² and it is also an involuntary payment when made to avoid a statutory penalty or to prevent embarrassment to business;³ or where a person is compelled under protest to pay an assessment levied against his property without authority of law, at the same time he pays his taxes, to prevent a sale of property.⁴ Money may also be involuntarily paid where the possession or interest of the parties requires the performance of a duty enjoined by law, and it is necessary to pay the money to induce that performance.⁵ Money paid under a law levying an assessment on the liquor traffic, declared unconstitutional, but before it is so declared, cannot be recovered back, though paid under compulsion.⁶ The fact that payment is a voluntary one is a defense, the burden of proving which is upon the officer making the collection.⁷ The petition in an action to recover an illegal assessment must aver the facts which show illegality, as a mere allegation that the same is illegal and void is a conclusion of law.⁸ To warrant recovery of money paid for a tax, it must appear that the proceedings were apparently regular, and that the rights of the parties have been changed since the payment.⁹ Mere irregularities cannot be a ground of recovery.¹⁰ It is said that an action to recover back assessments illegally collected by a county treasurer should be against him individually, and not in his official capacity.¹¹ As there is no privity between two boards of education, one can

¹ *Catoir v. Watterson*, 88 O. S. 819.

² *Mays v. Cincinnati*, 1 O. S. 268.

³ *Ratterman v. Express Co.*, 49 O. S. 608; *Western Union Tel. Co. v. Mayer*, 28 O. S. 521. As to involuntary payment, see *Trustees of Jackson Tp. v. Thoman*, 51 O. S. 285.

⁴ *Stephan v. Daniels*, 27 O. S. 527.

⁵ *Baker v. Cincinnati*, 11 O. S. 534-40, and cases cited.

⁶ *Herzberg v. Willy*, 13 W. L. R. 384.

⁷ *Adams Express Co. v. Ratterman*, 21 W. L. R. 238.

⁸ *Pelton v. Bemis*, 44 O. S. 51; *Bliss on Code Pldg.*, secs. 218, 334; *Pomeroy's Rem.* 580; *Higgins v. Pelton*, 4 W. L. R. 751.

⁹ *Peyser v. Mayor*, 70 N. Y. 497.

¹⁰ *Simmonson v. Harrison*, 32 N. E. Rep. 585 (Ind., 1892); *Wiesmann v. Brighton*, 83 Wis. 550; *Rutledge v. Price Co.*, 66 Wis. 85.

¹¹ *Hornberger v. Case*, 13 W. L. R. 511 (Logan Co. C. P.).

not recover through the other taxes erroneously collected by either.¹ It is no defense to an action by a city treasurer against a county treasurer for the recovery of taxes that the same were paid under protest and to avoid the distraint of his property.² A suit can not be maintained by one tax-payer on behalf of himself and others, to recover back taxes illegally assessed, but each must bring a separate action.³

Sec. 1178. Action to recover taxes due.—The county treasurer is authorized to enforce the payment of taxes by a civil action in his own name. He should allege in his petition that the taxes stand charged upon the duplicate of the county against the person against whom recovery is sought, that the same are due and unpaid, and that such person is indebted in the amount appearing to be due upon the duplicate. He is specially relieved from setting forth any other matter relating thereto.⁴ If he makes a full statement of all the steps taken, he is not precluded from taking advantage of the provision of the statute allowing the tax duplicate to be used in evidence.⁵ It is not necessary that such an action be in the individual name of the treasurer as plaintiff, nor will it abate by the expiration of his term of office.⁶ A petition for the recovery of taxes and assessments under a certain act need not allege more than is required by the act.⁷

Sec. 1178a. Same continued—Defenses.—If the defendant in an action to recover taxes assessed against him claims that a portion thereof are illegal, he must specifically set forth in his answer what amount he claims to be illegal, and the facts constituting such illegality.⁸

Sec. 1179. Petition by county treasurer for collection of taxes.—

The plaintiff, A. J. H., says he is the duly elected, commissioned, qualified and acting treasurer of — county, Ohio. Plaintiff says that personal taxes to the amount of — dollars and — cents stand charged against the defendant, S. B. S., on the duplicate of taxes of said county, placed in the hands of this plaintiff for collection by the auditor of said county, which said taxes are due and unpaid, and said defendant is indebted to said A. J. H., as treasurer of said county in the sum of \$—, the sum charged against defendant as tax as aforesaid.

¹ Board v. Board, 44 O. S. 278.

² Ratterman v. State, 44 O. S. 641.

³ Trustees of Jackson Tp. v. Thoman, 51 O. S. —.

⁴ R. S., sec. 2859.

⁵ Wade v. Kimberley, 5 O. C. C. 33.

The duplicate is *prima facie* evidence

of every fact necessary to authorize an assessment or tax. *Stevenson v. Hunter*, 1 Toledo Legal News, 411 (Pugsley, J.).

⁶ Covington, etc. Bridge Co. v. Mayer, 31 O. S. 817.

⁷ Cummins v. Fitch, 1 W. L. B. 77.

⁸ Hunter v. Austin, 9 O. C. C. 583.

Wherefore plaintiff says there is due to him, as such treasurer, from said defendant, \$——, with interest from this date, ——, 18—. And he therefore asks judgment against said defendant for said sum of \$——, with interest from ——, 18—, and costs of this suit.

J. M. G.,

Attorney for Plaintiff.

NOTE.— From *Shotwell v. Moore*, 45 O. S. 632.

Sec. 1180. Petition for collection of taxes, asking for the sale of personal property.—

1. Plaintiff says that he is the duly elected and qualified treasurer of —— county, Ohio, and that the defendant, E. S., is [a married woman, and has under her own control, and is] possessed of a —— estate, consisting of personal and real property of the value of —— dollars and upwards.

Plaintiff further avers that —— dollars and —— cents taxes stand charged on the duplicate of —— county, Ohio, against the said defendant, E. S., for the year 18—; that the same are the taxes and penalty on the said personal estate of the said E. S.; that said taxes and penalty are due and unpaid, and that the said E. S. is indebted to plaintiff, as treasurer of —— county, Ohio, in said sum of —— dollars and —— cents, the amount of said taxes and penalty. Wherefore plaintiff asks judgment against the defendant, E. S., for said sum of —— dollars and —— cents and costs of suit.

2. Plaintiff further asks that said taxes and penalty may be made a charge on the separate estate and property of said E. S., and that defendant be ordered by the court to pay said taxes and penalty within a short day to be named by the court, and that in default thereof execution may issue as upon judgment at law to the sheriff of —— county, commanding him to levy upon and sell so much of the personal estate, and, for want thereof, of real estate of said E. S., sufficient to pay said taxes and penalty and the costs of this suit and proceedings; and plaintiff asks for all other orders and decrees proper and equitable in the premises. A. & I., Attorneys.

NOTE.— From *Myers v. Seaberger*, 45 O. S. 232. And although the petition did not prevail it was not the fault of the petition itself.

CHAPTER 87.

TRESPASS.

Sec. 1181. Trespass — The petition in action for.	Sec. 1186. Petition for injury to dwelling-house.
1182. Trespass — Equitable relief.	1187. Petition for trespass in breaking and entering shops and carrying away chattels.
1183. Damages recoverable.	1188. Trespass — Defenses.
1184. Petition for trespass by tearing down fence.	1189. Answer justifying trespass by claiming legal title.
1185. Petition by one in possession for injury to grass and herbage.	

Sec. 1181. Trespass — The petition in action for.— The common-law action of trespass was one for a direct injury to the land of another. If the injury was occasioned by an indirect act, the remedy was by an action on the case, and not trespass. Trespass is now applied in effect to all kinds of injuries to land, the form and name only being abolished,¹ though it has been said that it is no longer necessary to observe the old terms used in the action; the words “wrongfully and unlawfully” having superseded the former allegation “with force and arms.” The fundamental requirement of the code, that the cause of action should be stated in plain and concise language, only need be observed.²

At common law the action was not to try title, and questions of title did not necessarily arise in the action, though the ownership of the premises was subject to dispute. An action for *trespass quare clausum fregit* does not of itself bring the title in question, for the defendant may admit the title and deny the trespass. The rule adopted under the code is that a defendant may put the question of the plaintiff's title in dispute, and may claim the legal title in himself and have the same determined, as a means of justifying the trespass.³

¹ Mathis v. McCord, W. 647.

² Darst v. Rush, 14 Cal. 81, 84.

³ Branson v. Studebaker, 33 N. E.

Rep. 98 (Ind. App., 1892); Lyon v. Fairbank, 79 Wis. 455.

Though it is unnecessary for plaintiff to allege title in himself, possession alone being sufficient, yet, if he does make a specific statement of title in himself and denies title of the defendant, the question of title is thereby put in issue.¹ Ownership of the legal title, therefore, is regarded as immaterial, it being only essential that the plaintiff was in actual possession at the time of the trespass,² the recitals or averments of ownership by the plaintiff being regarded by some courts as only incidental to the possession alleged.³ A petition for cutting and carrying away plaintiff's trees need not state that the land where they stood belonged to plaintiff.⁴

An allegation that the plaintiff is "entitled to the exclusive possession" has been held to be an assumption or conclusion of law from facts which were traversable, and not proper. He must have possession and must allege that fact.⁵ But it is held that where the distinction between the action on the case and trespass has been abolished, a landlord may maintain an action of trespass without being in possession or having the right of possession.⁶

Sec. 1182. Trespass—Equitable relief.—The rule that no contribution lies between trespassers is not of universal application. It applies only where two persons together have been the cause of a wilful wrong and are claiming contribution,⁷ and they may be sued jointly or severally, each being liable.⁸ When acts of trespass are numerous and of such a

¹ Branson v. Studebaker, 88 N. E. not be alleged. Gray v. Cooper, W. Rep. 98 (Ind. App., 1892). 500.

² Rowland v. Rowland, 8 O. 41; ⁴ Gronour v. Daniels, 7 Blackf. 108. Utterdorffer v. Saegers, 50 Cal. 496; ⁵ Garner v. McCulloch, 48 Mo. 818; Sweetland v. Stetson, 115 Mass. 49. Sheridan v. Jackson, 72 N. Y. 170.

³ Nicol v. Railroad Co., 44 La. Ann. ⁶ Coe v. English, 6 Houst. (Del.) 816. Plaintiff must show title or possession. Kline v. Mann, 29 Ia. 112. 456; Walden v. Conn, 84 Ky. 812. It is not necessary to allege title in the petition—"We are not concerned with the sufficiency, or even the existence, of such title. The fact and the nature of the possession alone is at issue." Williams v. Harmanson, 41 La. Ann. 705; 6 So. Rep. 604; Hermitage P. & M. v. Higginson, 14 So. Rep. 919 (La., 1894). Possession need

not be alleged. Gray v. Cooper, W. Rep. 98 (Ind. App., 1892). 500.

⁷ Acheson v. Miller, 2 O. S. 208. ⁸ McReady v. Rogers, 1 Neb. 129. See sec. 140, p. 184, n. 5, and 141, p. 187, n. 2.

trifling character as to make it useless to resort to an action at law, a court of equity may grant appropriate relief;¹ although equity will not interfere to prevent a mere trespass where a remedy in damages will be adequate.² It is otherwise where it is necessary to prevent irreparable mischief or to suppress a multiplicity of suits and oppressive litigation.³

Following the rules of pleading in actions to enjoin, the facts showing an injury to be irreparable must be distinctly alleged.⁴

Sec. 1183. Damages recoverable.—In an action for trespass to realty, only such damages as have been demanded can be recovered.⁵ If the plaintiff fails to make out a case he cannot recover for any consequential damages.⁶ Damages which do not necessarily result from a trespass, to be recovered, must be specially pleaded.⁷ The plaintiff may recover for whatever loss he sustains, and in the absence of proof of actual loss he may recover nominal damages;⁸ and in some cases, where the conduct of the trespasser is wanton or wilful, exemplary damages may be allowed.⁹ For an injury to a building in addition to damages to the building, a further sum, for loss of enjoyment while interrupted in its use, may be recovered.¹⁰ The words, "with force and arms broke and entered upon the premises," do not under the present system confine proof to the direct and immediate damage, as in the old action.¹¹

Sec. 1184. Petition for trespass by tearing down fence.—

Plaintiff states that on or about the — day of —, 18—, in said county, the said defendant did unlawfully and wilfully, and with force and arms, break and enter into and upon the premises of plaintiff, and did then and there take down a certain fence belonging to this plaintiff, inclosing the premises of this plaintiff, and that by reason of the unlawful entry of

¹ *Lembeck v. Nye*, 47 O. S. 336.

² *Bank v. Debolt*, 1 O. S. 591; *Ross v. Page*, 6 O. 166.

³ *Bank v. Debolt*, 1 O. S. 592; *Mocoy v. Chillicothe*, 3 O. 370.

⁴ *High on Injunctions*, sec. 461.

⁵ *Linduff v. Railroad Co.*, 14 O. S. 336.

⁶ *Brown v. Lake*, 29 O. S. 64; *Repps v. Barker*, 4 Pick. 232.

⁷ *Spencer v. Railroad Co.*, 21 Minn. 362; *Wampach v. Railroad Co.*, 21 Minn. 364.

⁸ *Hefley v. Baker*, 19 Kan. 1.

⁹ *Hefley v. Baker*, *supra*; *Wiley v. Keokuk*, 6 Kan. 94-106; *Railroad Co. v. Rice*, 10 Kan. 426.

¹⁰ *Cincinnati v. Evans*, 5 O. S. 594.

¹¹ *Darst v. Rush*, 14 Cal. 81.

the said defendant in and upon the said premises and of taking and tearing down the fence of this plaintiff, one of plaintiff's cows, which was at that time upon his said premises, got out and strayed from his premises and was lost by the acts of the defendant. That by reason of the acts of said defendant, and the results consequent therefrom, plaintiff has sustained damages in the sum of \$——.

Wherefore plaintiff demands judgment against the said defendant for the sum of \$——.

NOTE.—The above form merely states a cause of action for a trespass to realty, the allegations as to loss of cow being consequential damages. *Sayles v. Bemis*, 57 Wis. 315; *Merriman v. M. H. M. Co.*, 86 Wis. 46.

Sec. 1185. Petition by one in possession for injury to grass and herbage.—

That at divers times on and between the —— day of ——, 18——, and ——, 18——, the defendant wrongfully broke and entered certain lands of the plaintiff, situate in the county of ——, and state of ——, and described as follows, to wit: [*description*], and depastured the same and injured the grass and herbage of the plaintiff, then and there growing, to the plaintiff's damage in the sum of \$——, for which sum as damages plaintiff asks judgment.

NOTE.—One in the actual possession of land may maintain trespass against any one except the real owner. *Stahl v. Grover*, 80 Wis. 650, and cases cited.

Sec. 1186. Petition for injury to dwelling-house.—

That on the —— day of ——, 18——, the defendants did wrongfully and unlawfully enter upon the land and premises of plaintiff in the town of ——, and county of ——, in said state, which land is [*describe briefly*], and of which plaintiff was then the owner and in peaceable possession, and upon which plaintiff had erected a dwelling-house and was occupying the same, and had erected fences upon said premises and other valuable improvements.

That the defendants and each of them, without any warning, upon the date aforesaid did tear down and carry away the fences, and did tear down and destroy the said dwelling-house then in the occupancy of plaintiff, and carry away and destroy his household furniture, to the damage of plaintiff in the sum of \$——.

[*Prayer.*]

NOTE.—See *Lyon v. Fairbank*, 79 Wis. 453.

Sec. 1187. Petition for trespass in breaking and entering shops and carrying away chattels.—

[*Caption and formal averments.*]

That on the —— day of ——, 18——, at the city of ——, in the county of —— and state of ——, the said defendants, and

by their agents, servants and employees, with force and arms, broke and entered the close of the plaintiff, of which he was then in peaceable possession, in the city of — aforesaid, entered his shops, warerooms, yards and premises, and took from his possession and carried away and converted to their own use one binder and harvester of the value of \$——, one mower of the value of \$——, seven pieces of canvas, and also various other articles, pieces of machinery, goods, wares and merchandise, of the value of \$——, the goods and property of the plaintiff, wherein and whereby the plaintiff suffered great damage in the loss of said property, and in the interruption, interference and damage to his business which he carried on in said shops, warerooms and yards, and by the taking of said property he was greatly injured in his standing and credit with others, and was damaged in the sum of \$——, for which he asks judgment against said defendant.

NOTE.—Approved in *Merriman v. McCormick H. M. Co.*, 86 Wis. 142, from which it is taken. "This form of the complaint in such a case has been sanctioned by the common-law practice of a great many years in England and in this country as the approved form of pleading. There is but one cause of action, and that is trespass *quare clausum fregit*, and the other continuous acts of the defendant are stated as consequential damages arising therefrom and connected therewith." 86 Wis. 146, and authorities cited.

Sec. 1188. Trespass — Defenses.—A judgment against one joint trespasser cannot be pleaded in bar to a separate action for the same trespass against another joint trespasser.¹ A defendant who claims legal title, and hence justifies his acts, may place title in issue by answer and have it tried and determined;² but title cannot be raised by an answer denying the allegations of a petition which alleges that a defendant broke and entered the close of plaintiff, and tore down and destroyed fences.³ Under a general allegation charging a defendant with breaking and entering the plaintiff's close, giving a description of the premises, title in both plaintiffs may be shown.⁴ A purchaser of timber cannot, before he has severed the same from the land, sustain an action in trespass against the personal representative of the owner or his grantee.⁵ The defense most usually pleaded is a general denial, under which it may be shown that the plaintiff was not the owner or in possession, but that the premises were occupied by a tenant.⁶

¹ *Wright v. Lathrop*, 2 O. 33.

⁵ *Fletcher v. Livingston*, 153 Mass.

² *Lyon v. Fairbank*, 79 Wis. 455.

388.

³ *Squires v. Seward*, 16 How. Pr. 478.

⁶ *Uttendorffer v. Saegers*, 50 Cal. 496; *Land & F. Co. v. Gasquet*, 13

⁴ *Kinney v. Service*, 91 Mich. 629. So. Rep. 171 (La., 1893). See *Boone's*

Nor can a license from the plaintiff to do the acts complained of be shown unless specially pleaded, though it may be if the title be claimed against the plaintiff.¹ In an action against both husband and wife, and for trespass by the latter, she may make a separate defense, which will be a complete bar to both.² A deed made to the defendant after the trespass complained of is not a good defense,³ nor is an answer justifying a trespass merely because the defendant has an easement.⁴

Sec. 1189. Answer justifying trespass by claiming legal title to lands.—

Defendant states that at the time of the complaints alleged in plaintiff's petition, and for many years previous thereto, he was the legal owner of the premises set forth and described in plaintiff's petition. That the plaintiff unlawfully and wrongfully entered upon the said premises and took possession thereof, and unlawfully and tortiously placed lumber thereon and built structures thereon, which interfered with the defendant's possession and enjoyment thereof. That the defendant without any unnecessary force removed said structures from the property.

NOTE.—A defendant may dispute possession and rely on legal title to justify his acts, and have it tried and determined. *Lyon v. Fairbank*, 79 Wis. 455.

Pleading, sec. 208, note 1, and cases. *hart v. Geir*, 54 Wis. 183; *Beatty v. Swarthout*, 83 Barb. 298.

The trespass cannot be excused by showing possession or title in a third person. *Patterson v. Clark*, 20 Ia. 439. ²*Lowe v. Redgate*, 43 O. S. 329; *ante*, sec. 11.

¹*Boltz v. Smith*, 8 Ind. App. 43-6; ³*Davis v. Elmore*, 19 S. E. Rep. 204 (S. C., 1894).

Rawson v. Morse, 4 Pick. 127; *Benton v. Allen*, 33 Vt. 486; 2 *Greenleaf's Ev.* (14th ed.), sec. 635; *Lock-*

⁴*Pico v. Colinas*, 23 Cal. 573.

CHAPTER 88.

TRUSTS.

Sec. 1190. Actions relating to trusts.

1191. Petition to declare trust in real estate and to enforce conveyance.

Sec. 1190. Actions relating to trusts.—In actions involving trusts the jurisdiction of equity is not dependent upon the absence of a remedy at law.¹ If the claim upon which suit is brought must be paid out of a trust fund, the trustee and *cestui que trust* should be joined as defendants.² In an action by a grantor for whom the grantee is holding the legal title to land in trust, to set aside a conveyance by his grantee to another upon the same trust, and for its enforcement, the first grantee is not a necessary party. In an action to declare a trust and make it a charge upon the trust estate, the holders of the legal title and persons claiming an interest in the property should be made parties, though a former trustee who has been divested of all title need not be joined.³ Equity will not declare a trust in land on the ground that a person has contributed purchase-money, the legal title to which has been taken in another, unless the amount contributed be a definitely ascertainable aliquot part.⁴ A petition to declare a deed absolute on its face a trust should specifically allege the trust upon which it is made, or an implied trust; if the latter, facts clearly showing the trust arising by implication should be stated.⁵ Where a court of equity acquires jurisdiction over the persons of the parties, it may enforce a trust, or the specific performance of a contract in relation to land situate in another state.⁶ And a trust may be enforced where the conduct of a trustee amounts to a direct repudiation of the trust, even though it may involve the construction of a will.⁷

¹ *McCampbell v. Brown*, 48 Fed. Rep. 795.

² *Emmert v. Delong*, 12 Kan. 67.

³ *Hubbel v. Hubbel*, 22 O. S. 208.

⁴ *Reynolds v. Morris*, 17 O. S. 510.

⁵ *Rowell v. Freese*, 28 Me. 182.

⁶ *Burnley v. Stevenson*, 24 O. S. 474. See *ante*, sec. 87.

⁷ *Cassidy v. Hynton*, 44 O. S. 530; *Spreen v. Sandman*, 2 O. C. C. 444.

To warrant a court in interfering with a trust for the propagation of definite principles, upon the ground that there has been a diversion from the use intended by the donor, there must be a plain and palpable abuse of the trust.¹ And where two bodies of a religious society assert claims to a trust, each may be required to interplead, so that it may be determined who is the rightful beneficiary. A petition to declare a trust should clearly set forth all the facts and circumstances attending the transaction from which the trust is claimed to result.² In an action by a trustee the facts out of which the trust relation grew must be stated.³ A trustee cannot sustain an action for deceit to recover damages suffered by his *cestuis que trustent*, nor can he bring an action for fraud.⁴ Nor can he, by the use of trust funds in his own business, create any liability against them, unless with the consent of the beneficiary who shares in the profits.⁵ A trustee who in good faith and without negligence deposits trust funds in a reputable banking house to his credit as trustee cannot be held responsible for their loss.⁶ Open and peaceable possession for more than twenty-one years by one who claims ownership is a good defense to the action for the recovery of land so held, whether the plaintiff be a trustee or his beneficiary.⁷ There are other questions relating to trusts discussed in a succeeding chapter.⁸

Sec. 1191. Petition to declare trust in real estate and to enforce a conveyance.—

That on the — day of —, 18—, plaintiff employed the defendant as his agent to purchase for him the following described real estate: [*describe it*], [*or, such real estate as the defendant might in his judgment deem advisable to purchase as an investment*], and furnished him for said purpose the sum of — dollars.

¹ *Lamb v. King*, 129 Ind. 486.

⁴ *Raymond v. Railway Co.*, 21 W.

² *Courvoisier v. Bouvier*, 3 Neb. 55;

L. B. 108.

Rowell v. Freese, 23 Me. 183; *Danforth v. Herbert*, 83 Ala. 497. The proof must be clear, certain and conclusive, not only of the trust, but of its terms and conditions. *Stall v. Cincinnati*, 16 O. S. 169; *Miller v. Stokely*, 5 O. S. 194.

⁵ *Adams v. Nelson*, 31 W. L. B. 46 (C. S. C. R., 1894).

⁶ *Odd Fellows' Ben. Ass'n v. Ferson*, 3 O. C. C. 84; *Perry on Trusts*, sec. 443; *Pomeroy's Eq. Jur.*, sec. 1067; *McLaws v. McGregor*, 1 C. S. C. R. 327.

³ *Wilson v. Poke Co.*, 112 Mo. 126; *Bromley v. Mitchel*, 155 Mass. 509.

⁷ *Veasie v. McGugin*, 40 O. S. 365.

⁸ See chapter on Wills, sec. 1212.

That the defendant thereupon, in pursuance of said employment, and as such agent only, did on the — day of —, 18—, purchase said real estate [*or*, the following described real estate (*describe it*)], paying therefor the sum of — dollars, which this plaintiff furnished him therefor.

That the defendant, without the [knowledge or] consent of plaintiff, took the deed of conveyance for said real estate in his own name.

That on the — day of —, 18—, plaintiff requested said defendant to account to plaintiff for the said money so furnished him, or that he convey the said premises to plaintiff, all of which was refused.

Wherefore plaintiff prays that the said defendant, by good and sufficient deed of conveyance, convey to plaintiff the legal title to said land, within a reasonable time to be fixed by the court, and that in default thereof the judgment and decree of the court stand for and effectuate said conveyance, and for such further relief as shall be just and equitable.

CHAPTER 89.

WAREHOUSEMAN.

Sec. 1192. Liability of warehousemen.
1193. Petition to recover charges for storage.

Sec. 1194. Petition for injury to goods through negligence of warehouseman.

Sec. 1192. Liability of warehousemen.—The law upon this subject is fully discussed in recent cases. The liability of a warehouseman depends on the nature and character of the transaction, whether it be a contract of sale, a *mutuum* or a deposit. If a sale, the right of property passes to the warehouseman upon delivery; if a *mutuum*, the absolute property passes to the mutuary, who is bound to restore only things of the same kind. If a deposit, the property remains in the bailor, and is held by the warehouseman as bailee, at the risk of the bailor, so long as he observes the terms of the contract.

Where wheat is deposited to be redelivered upon demand, upon payment of a reasonable compensation, it is a bailment. If the depositary has the privilege of redelivering the specific thing, or other of the same kind, the property passes to the depositary as fully as in an ordinary sale.¹ The transaction is clearly a bailment where the wheat is stored at the owner's risk, and there is no agreement as to mixture or sale. And no change is made in their legal rights if the warehouseman sells without authority, not going beyond that to which he himself is entitled;² and so is it where grain is received and mixed in the warehouse, to be retained and shipped by the

¹ *Chase v. Washburn*, 1 O. S. 244; *Smith v. Clark*, 21 Wend. 88; *Norton v. Woodruff*, 8 Comst. 153; *Pierce v. Schenck*, 8 Hill, 28.

² *O'Dell v. Leyda*, 46 O. S. 244. See *Wells on Replevin*, sec. 203; *Ledyard v. Hibbard*, 48 Mich. 421. A person mingling wheat with that of a miller retains the ownership in so many bushels of the common stock as he has put in, the miller holding it as bailee. *Inglebright v. Hammond*, 19 O. 337; *Johnson v. Miller*, 16 O. 431.

warehouseman on his own account, he agreeing to pay the market price upon presentation of the receipt.¹

The mere election to treat a bailment as a sale at some future time does not deprive it of its character as a bailment,² although the owner has that privilege when the depositary appropriates to his own use more than his proportion of the common mass.³ A warehouseman may also become a tenant in common like any other depositor, and withdraw his share without affecting that of other co-tenants.⁴ A contract of sale, rather than of bailment, will be presumed; but where a warehouseman has for many years received grain in store for others to buy and sell, it will not arise, and other circumstances must appear to show the nature of the transaction.⁵ The liability and remedy therefore depend upon the relations existing between the parties. If a bailment, and the warehouseman mixes wheat with that of others and ships it as his own, he is liable for its value, even though he supplies other wheat,⁶ or he is liable as an ordinary bailee for its loss.⁷ If a sale, the vendor may sue to recover the value of the wheat sold or delivered.⁸ If a bailment, an action of replevin will lie.⁹ And where corn is left for storage with the understanding that the warehouseman is to give the owner other corn, which he is unable to do by reason of a fire, the remedy is an action for money had and received.¹⁰ An action for conversion may also be sustained against a warehouseman;¹¹ and if damages be also sought in such action, the petition should contain averments which fairly and reasonably apprise the defendant of the same.¹²

¹ Chase v. Washburn, 1 O. S. 244. this will be considered a bailment and not a sale. Id.
² Colton v. Wise, 7 Ill. App. 395; ⁶ Chase v. Washburn, 1 O. S. 244.
 Plow Co. v. Porter, 82 Mo. 23; Led- ⁷ Chase v. Washburn, *supra*.
 yard v. Hibbard, 48 Mich. 421. ⁸ James v. Plank, 48 O. S. 255.
³ James v. Plank, 48 O. S. 261. ⁹ O'Dell v. Leyda, 46 O. S. 244.
⁴ Sexton v. Graham, 58 Ia. 181. ¹⁰ Cloke v. Shafroth, 187 Ill. 393
⁵ James v. Plank, 48 O. S. 255. (1891); Ardinger v. Wright, 38 Ill.
 Where there has been a custom well App. 98.
 understood, that, in the absence of ¹¹ Sanford v. Peck, 27 Atl. Rep. 1058
 contract, wheat was to be mingled, (Conn., 1898).
 the warehouseman having only the ¹² Taylor v. Keeler, 50 Conn. 346;
 privilege of disposing of the same Sanford v. Peck, *supra*.
 upon condition that he will have on hand enough to satisfy all depositors,

Sec. 1193. Petition to recover charges for storage.—

[*Caption and formal averments.*]

There is due plaintiff from defendant the sum of \$—— for the storage of certain goods, to wit: [*describe goods*], which plaintiff stored in its warehouse at ——, at the request of and for said defendant, for the space of [*state time stored*], which was the sum agreed upon at the time said goods were stored with plaintiff.

[*Prayer.*]

Sec. 1194. Petition for injury to goods through negligence of warehouseman.—

That on the —— day of ——, 18——, the defendant kept a warehouse at ——, and for a valuable consideration agreed to store and keep safely in his said warehouse the following goods for plaintiff, to wit: [*describe them*], which said goods were of the value of \$——, and the defendant, as warehouseman, then received said goods.

That at the time said goods were delivered to the defendant the plaintiff informed him of the nature and character of said goods. [*State how they should have been kept.*]

That the defendant, while said goods were in said warehouse, negligently [*state negligence*], whereby the same were [*state injury*], to the damage of plaintiff in the sum of \$——.

NOTE.—See *Oderkirk v. Fargo*, 16 N. Y. S. 220; *Leoncini v. Post*, 13 N. Y. S. 824. Negligence of warehousemen rendering them insurers. *Conover v. Wood*, 48 Minn. 488. An agreement by a warehouseman to insure goods stored with reliable insurance companies does not render him an insurer of the goods. *Lancaster Mills v. M. P. & Storage Co.*, 14 S. W. Rep. 817 (Tenn., 1890).

CHAPTER 90.

WARRANTY.

Sec. 1195. Warranty—The petition.	Sec. 1198. Petition for false warranty
1196. Petition for breach of warranty of a piano.	of horse as to soundness and habits.
1197. Petition for breach of warranty as to breeding qualities of horse.	1199. Warranty—The answer.
	1200. Answer denying false representations.

Sec. 1195. Warranty—The petition.—A warranty is either express or implied. The former may be either verbal or written. Where the vendor has possession of the property there is an implied warranty.¹ It must be alleged whether it is written or verbal. But in the absence of such an allegation there can be no presumption that it was a verbal warranty, and a written one may be shown.² It must appear that the plaintiff relied and acted upon the statements of warranty.³ The person complaining must be prompt in giving notice of the breach of warranty, being bound only to a substantial compliance with the contract to enable him to rescind the same.⁴ In some instances he may be allowed to claim damages for a breach without rescinding or returning the goods;⁵ although a purchaser who has used a machine for an unreasonable length of time is in no position to rescind a contract, even though it does not comply with the terms of warranty.⁶ The petition must state clearly wherein the breach of warranty lies. If the thing sold be of less value by reason of the breach, it must be so alleged.⁷ The sale should first be set out, then the warranty and its breach, together with the fact that the plaintiff relied on it, and the condition or value of the property. An

¹ *Burt v. Dewey*, 40 N. Y. 283; *Norton v. Hooten*, 17 Ind. 365; *Marshall v. Duke*, 51 Ind. 62.

² *Watson v. Roode*, 30 Neb. 264 (1890).

³ *Watson v. Roode*, *supra*.
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⁴ *Sandwich Mfg. Co. v. Feary*, 34 Neb. 411-15 (1892).

⁵ *Dayton v. Hooglund*, 39 O. S. 671.

⁶ *Clark v. Deering*, 29 Neb. 293.

⁷ *Ferguson v. Hosier*, 58 Ind. 433.

allegation of sale at a certain price, without specifying the price actually paid, will be sufficient.¹ Where there was no warranty, but false representations were made, a *scienter* must be alleged to sustain an action in form *ex delicto*.² A vendee may have a right of action for a breach of warranty or a counter-claim for damages, whether the purchase was for cash or on credit, or whether he was solvent or insolvent;³ and so if the price has not been paid but a note has been given.⁴ Where the articles warranted were designed for a particular purpose, the same should be pointed out.⁵

Sec. 1196. Petition for breach of warranty of a piano.—

On the — day of —, 18—, plaintiff purchased from the defendant a piano for the sum of \$—; that as an inducement for him to make said purchase, one O. D., agent of said defendant, represented to him that said piano in question was worth \$—, and that he had never sold one for less than \$—, and that they could not be purchased for less than that sum.

That said O. D., agent aforesaid, further represented [*state any particular representations*].

That plaintiff was not a judge of pianos, and so informed said defendant, and that he would rely on his furnishing an instrument which was perfect and worth the amount of money paid. The said defendant further represented to plaintiff that he would warrant said instrument for five years, and that it should be all right in every particular, and said defendant did make such warranty.

That in fact said instrument was not as represented, in this: that it was not worth more than \$—; that the said defendant had been selling said instruments of the kind and quality purchased by plaintiff for \$—; that it is not worth more than half as much as plaintiff paid for the same; that said piano is of an inferior grade, and not as good a piano as the — and others of the same kind; that said piano was not satisfactory to plaintiff, and he so informed the defendant numerous times and asked him to take it back and furnish him with another instrument worth the amount of money paid by the plaintiff; that said piano has been out of repair for the

¹ *McMillan v. Theaker*, 12 O. S. 24 (1848).

² *Goodenow v. Snow*, 27 Vt. 720.

³ *Volland v. Baker*, 22 Neb. 391 (1891).

⁴ *Thoreson v. Harvester Co.*, 13 N. W. Rep. 156; 29 Minn. 341.

⁵ *Booher v. Goldsborough*, 44 Ind. 490; *Lafayette, etc. Works v. Phillips*, 47 Ind. 259; *Robinson, etc. Works v. Chandler*, 56 Ind. 575; *Johnston, etc. Co. v. Bartley*, 81 Ind. 406; *McClomrock v. Flint*, 101 Ind. 278.

full year since he bought it; that he has notified defendant several times that it was so out of repair, and that said defendant has several times attempted to repair it, but that the same would not remain in repair, and that the said piano is not worth more than \$——.

Plaintiff therefore has, by reason of the premises and of the false representations, been damaged in the sum of \$——, for which he asks judgment.

NOTE.— Approved in *Lyon & Healy v. Moore*, 35 Neb. 686.

Sec. 1197. Petition for breach of warranty as to breeding qualities of horse.—

That on the —— day of ——, 18—, at the county of ——, and state of ——, the defendant sold to the plaintiff a Percheron Norman stallion called or named ——, as and for a stock horse and for breeding purposes, and that the plaintiff paid the defendant therefor the sum of \$——.

That the defendant represented the said horse to be fit and good for breeding purposes, and that the plaintiff believed and relied upon such representations so made to him by the defendant at the time of said purchase.

That said horse was not fit for breeding purposes, either at the time when he so purchased him from the defendant or since then, but was entirely unfit and worthless for such use and purpose. That the plaintiff has incurred expenses in having said horse examined and tested, and in keeping and taking care of him, to the amount of \$——; and said horse being of no use or value for the service for which he purchased him, by reason of defendant's false representations in this behalf, plaintiff has sustained damages in the sum of \$——.

That the plaintiff, before the commencement of this suit, offered to return said horse to the defendant, but that he refused to take him or to have anything to do with him; and that he also, before the commencement of this action, demanded of the defendant the repayment to him of the purchase price of said horse, but that he refused to pay him anything whatever.

Plaintiff therefore asks judgment against the defendant in the sum of \$——.

NOTE.— Allegations in foregoing form approved in *Bergeler v. Michael*, 84 Wis. 627.

Sec. 1198. Petition for false warranty of horse as to soundness and habits.—

Plaintiff on the —— day of ——, 18—, at the special instance and request of the said defendant, purchased a certain

horse, for a certain price or sum of money, to wit, the sum of — dollars; and the said defendant falsely and fraudulently warranted the said horse to be sound and quiet in harness, and thereby induced plaintiff to pay the said sum of — dollars to the said defendant. Plaintiff avers that said horse at the time of said sale was unsound in this: it was unsteady, restive and ungovernable in harness, and had so remained and continued since the time of said purchase. Plaintiff says that the said defendant, by means of the premises, falsely and fraudulently deceived him on the sale of the said horse aforesaid, as said horse afterwards, to wit, on, etc., not only became of no use or value to the said plaintiff, but also then and there kicked, hurt, injured and ruined a certain other horse belonging to said plaintiff, of great value, to wit, of the value of — dollars; and plaintiff was put to great expense, ¹ the whole amounting to a large sum, to wit, the sum of — dollars, in and about the feeding and taking care of, selling and disposing of, the said horse.

NOTE.—The vendor is liable for patent defects. *Watson v. Roode*, 30 Neb. 264.

Sec. 1199. Warranty.—The answer.—In an action to recover the price of goods sold, a defendant may set up a breach of warranty, claiming a sum greater than the demand of the plaintiff, by reason of fraudulent representations.¹ But if the amount claimed by him be less than the claim of the plaintiff, judgment may be rendered for the amount admitted.² He may in such action recoup to the extent that he has been injured by the breach, even after retaining and using the goods.³ Where upon the sale of stock both parties are alike ignorant of the breeding qualities thereof, and there is no misrepresentation or express warranty, there can be no implied warranty merely because a full price was paid for the animal and the seller knew that it was being purchased for breeding purposes.⁴

Sec. 1200. Answer denying false representations.—

The defendant denies each and every allegation in the plaintiff's petition contained except that hereinafter admitted, qualified or explained.

¹ *Needham v. Pratt*, 40 O. S. 186.

v. Isling, 18 Gray, 607; *Hyatt v.*

² *Moore v. Woodside*, 26 O. S. 587; *R. S.*, sec. 5820.

Boyle, 5 Gill & J. 121. See *Woodward v. Stein*, 3 Am. Law Rec. 359-2.

³ *Dayton v. Hooglund*, 39 O. S. 671; *Day v. Pool*, 53 N. Y. 416; *Bryant*

⁴ *McQuaid v. Ross*, 86 Wis. 492.

Defendant admits that on the — day of —, 18—, he sold to plaintiff a Percheron Norman stallion called or named — for the sum of \$—.

Defendant alleges that he made no representations in regard to the breeding qualities of said horse at the time of selling the same to the plaintiff, except what were true and honestly given.

Wherefore plaintiff asks judgment of this court that plaintiff's petition be dismissed.

CHAPTER 91.

WASTE.

Sec. 1201. Defined.	Sec. 1204. Petition for waste by land-
1202. Parties.	lord against tenant.
1203. Action for waste — The	1205. Petition by judgment cred-
petition.	itor to restrain waste.
	1206. Waste — The answer.

Sec. 1201. Defined.—Waste consists of some injury done to the land, house or corporeal hereditaments by a tenant. The strict common-law doctrine of waste has never been adopted in Ohio, so that many more things are permitted to be done by a life tenant than at common law.¹

Sec. 1202. Parties.—The action may be sustained by one parcener against another;² or by a reversioner against a tenant for life;³ or by a grantee against the mortgagor;⁴ or by a purchaser in a foreclosure suit before the sale has been confirmed;⁵ or by a devisee in an action against the son of a testator during the pendency of the probate of a will, for waste committed upon the testator's property.⁶ A judgment creditor has not such an interest or lien upon the estate as will enable him to sustain an action for waste committed thereon.⁷ But it has been held, and justly so, that where a judgment is a lien on but one piece of land, the owner of which is deceased, and from which lien only the judgment can be paid, and which is sufficient to satisfy the same, that equity will interfere to prevent the commission of waste so as to

¹ *Crockett v. Crockett*, 9 O. S. 180. (1850); *Coggill v. M. Land Co.*, 25

² R. S., sec. 5774. Or a tenant in common may join. *Greenly v. Hall*, 3 Harr. 9 (Del., 1844). ³ *Mutual L. Ins. Co. v. Bigler*, 79 N. Y. 568.

⁴ *Robinson v. Kime*, 70 N. Y. 147; ⁵ *Piatt v. Piatt*, 2 Dian. 408 (1858).

Robinson v. Wheeler, 25 N. Y. 252.

⁶ *Van Pelt v. McGraw*, 4 N. Y. 110 (1872). ⁷ *Lanning v. Carpenter*, 48 N. Y. 408

diminish the value and impair the security at the suit of a judgment creditor.¹

Sec. 1203. Action for waste—The petition.—The remedy will vary upon circumstances. There may be an adequate one at law; if not, injunction will lie to restrain the commission of waste. As a general rule, an account for waste committed is only incidental to an injunction, and not a substantive ground for relief, as there is an adequate remedy at law.² At common law the plaintiff was required to set forth how he was entitled to the estate, and this rule has been adopted to some extent in this country. He must allege seizin in fee in himself as well as a demise.³ Other courts hold that the plaintiff need not set out his title particularly, but that he may state that he is entitled to the immediate estate of inheritance.⁴ The proper allegation is to set out the exact nature of the plaintiff's rights, that it may appear whether he has such an interest as may entitle him to relief. This is the modern view. A tenant in dower is liable in damages to the person having immediate estate in reversion or remainder, on any waste committed or suffered thereto.⁵

Sec. 1204. Petition for waste by landlord against tenant.

Plaintiff is now, and was at the time of the commission of the acts hereinafter complained of, the owner in fee-simple of the following described premises situate in the county of — and state of —: [*Description.*]

That on the — day of —, 18—, by a written lease of that date duly entered into by plaintiff and defendant, plaintiff did lease to said defendant the premises above described for the term of — years, beginning on the — day of —, 18—. That the said defendant entered into the possession of said premises pursuant to the provisions of said lease, and was on the — day of —, 18—, and now is, in the possession and occupancy of the said premises. That it was specially provided in said lease that defendant should care for said premises in a proper manner and should not commit any waste thereon.

That on the — day of —, 18—, the defendant wilfully, wrongfully and without the consent or authority of plaintiff, and in disregard of the terms of said lease [*here state acts of*

¹ Vandemark v. Schoonmaker, 9 Hun, 16 (1876).

² Carris v. Ingles, 13 Wend. 70 (1834).

³ Greenly v. Hall, 3 Harr. 9 (Del.,

⁴ Crockett v. Crockett, 2 O. S. 180; 1844).

Junks v. Langdon, 21 O. S. 362.

⁵ R. S., sec. 4194.

waste], thereby greatly injuring and permanently lessening the value of said premises.

[*Allegation as to threatened acts of waste may be added here.*]

That by reason of the aforesaid acts of the defendant plaintiff has sustained damages in his said premises in the sum of \$——.

[*Prayer.*]

Sec. 1205. Petition by judgment creditor to restrain waste.—

[*Averment of judgment, etc.*]

That said judgment has not been paid, or any part thereof; that the said F. W. S. departed this life on the —— day of ——, 18—; that the personal estate of the said S. has been settled by the executor under the will of the said S., and that under the decree of the probate court of —— county, ——, there is due and payable to this plaintiff, out of the personal estate of the said deceased, to apply on the said judgment, \$——, which sum has not yet been paid, and which will leave a balance due thereon of the sum of \$——.

That plaintiff has no other fund, property or security out of or from which to collect or obtain the said judgment other than the real estate hereinafter described, which said real estate belonged to the said S., deceased, in his lifetime, and is all the real estate of which he died seized, and upon which said real estate plaintiff's said judgment is a valid and subsisting lien, the reasonable cash value of which is about the sum of \$——, said real estate being described as follows: [*Description.*]

That the said defendants are two of the devisees of said real estate and own an undivided interest therein, and are wholly insolvent and without pecuniary responsibility.

That there is upon said real estate valuable timber which adds greatly to its value, and the cutting and removal of the same will greatly impair its value; that the said defendants and their agents are now engaged in cutting and removing such timber and are committing waste on said premises, thereby greatly impairing its value, and are thereby impairing and jeopardizing the security of this plaintiff; that said premises, with the timber and wood thereon, are insufficient to pay and satisfy the said plaintiff's judgment, and if said defendants are allowed to continue cutting and removing the said timber, plaintiff's security will be much more depreciated and endangered.

Wherefore plaintiff asks that the said defendants and each of them, their agents and servants, be restrained and enjoined from cutting down, falling or impairing any timber, trees or underwood standing or growing on said premises, etc.

NOTE.—From *Vandemark v. Schoonmaker*, 9 Hun, 16. See *ante*, sec. 1201. There is no good reason why a judgment creditor can not sustain this action.

It is stated in the syllabus in *Lanning v. Carpenter*, 48 N. Y. 408, that a judgment creditor having a mere general and not a specific lien upon real estate cannot sustain an action for waste. But in the opinion, page 412, the court say: "If the plaintiff, as a judgment creditor, could sue for waste committed upon the real estate of the judgment debtor, he could only recover by showing that such waste damaged or endangered his judgment security." In that case there was no such allegation or proof.

Sec. 1206. Waste—The answer.—It is not waste for a widow to sell growing timber on wholly unimproved land, assigned to her for dower, to raise money to pay taxes.¹ Nor is a vendee, in possession of land under a contract of sale, liable to the vendor in an action for waste.² An answer that the defendant purchased the lands for himself and wife, and that the title was taken in the name of the plaintiff with the agreement that conveyance was to be made to the defendant, asking that plaintiff be charged as trustee and compelled to convey as per agreement, is an equitable defense and may properly be made.³ It is no defense that the tenant acted in good faith, or under a claim or right, or that he was in possession claiming title in fee, when the waste was committed.⁴ In an action by a landlord against his tenant for waste, the latter may set up a counter-claim for the value of personal property placed upon the premises during the tenancy, and which the landlord converted by preventing its removal.⁵

¹ *Crockett v. Crockett*, 2 O. S. 180.

See *Wilkinson v. Wilkinson*, 59 Wis. 98 (1877).

² *Allen v. McCoy*, 8 O. 418;

Schnebly v. Schnebly, 26 Ill. 116.

³ *Stauffer v. Eaton*, 18 O. 322 (1884).

⁴ *Zimmerman v. Amaker*, 10 S. C.

⁵ *Robinson v. Kime*, 70 N. Y. 147.

⁶ *Gilbert v. Loberg*, 86 Wis. 661.

CHAPTER 92.

WILLS.

Sec. 1207. Action to contest will.

- 1208. Petition to contest will on ground that it was made under undue influence.
- 1209. Petition to contest validity of nuncupative will.
- 1210. Petition to set fraudulent will aside.
- 1211. Answer in proceedings to contest nuncupative will.
- 1212. Answer of legatee in contest of will.

Sec. 1213. Action to construe will.

- 1214. Petition by executor for construction of will and direction as to distribution.
- 1215. Petition by executor for construction of particular clause in will.
- 1216. Answer of guardian in proceedings for construction of will.

Sec. 1207. Action to contest will.—An independent action to contest the validity of a will may be instituted by parties interested.¹ It may be prosecuted by a widow even though she has elected to take under the will.² Whether or not a person taking under a will may be put to an election is a question of some nicety. It can only be done when the will is valid; and it is said that the person taking under a will is not necessarily estopped from contesting its validity.³ But he may be required to repay any legacy received, or bring the money into court.⁴ All the devisees, legatees, heirs of the testator, and all interested persons, including the executor or administrator, should be made parties to such proceeding.⁵ The action must be brought within two years from the time the will is admitted to probate, excepting by persons under a disability, who may bring it within two years after the dis-

¹ R. S., sec. 5858.

² Carder v. Commissioners, 16 O. S. 353.

³ Bates v. Smith, 3 W. L. B. 344 (Ham. Co. D. C.).

⁴ Holt v. Rice, 54 N. H. 398; Hamblett v. Hamblett, 6 N. H. 333; Bra-

ham v. Burchell, 3 Addams, 248; Bell v. Armstrong, 1 Addams, 365.

⁵ R. S., sec. 5859. Legatees or devisees are necessary parties. Eddie v. Park, 31 Mo. 518; Jones v. Williams, 31 Ark. 175; Church v. Nelson, 35 O. S. 633.

ability is removed.¹ And the action is saved, when some only are made parties, as to those who are not brought in, until after the limitation has expired.²

In a contest of a will the forms either of a suit in chancery or of a petition under the code may be adopted; but in either case an issue in some form must be made, whether the writing produced be the last will of the testator or not.³ It may be made up either in the pleading or by an order on the journal.⁴ This issue can not be varied or restricted by the pleadings. Though the remedy is now classed as civil action, the rules of pleading applicable to ordinary civil actions must be disregarded when inapplicable.* The petition should allege some interest on the part of the plaintiff, either in the estate of the testator or in some other matter involved in the contest, stating also what relation the defendant sustained to the will, as well as the death of the testator.⁵ A copy of the will attached to the petition as an exhibit does not become a part of it so as to supply any averments which it ought to contain.⁶ All the facts which were involved when the will was admitted to probate are in issue and must be determined *de novo*.⁷ But the court has nothing to do with the validity or invalidity of doubtful legacies or bequests.⁸ An action to contest a will which had been revoked during the life-time of a testator may be sustained by those who would be entitled to the real estate devised if the will be set aside, after a termination of a life estate therein.⁹ An executor is not bound to assume the burden of a defense in a contest of a will by the heirs, and may properly throw the same upon the legatees or devisees.¹⁰ A will which has been admitted to probate upon false testimony may be set aside.¹¹ A petition in such an action should allege the death of the testator, his ownership of property, the interest of the plaintiff, the probate of the will, and the reasons why the will should be set aside.¹² Error will not lie to review the testimony upon which a will was admitted to probate, but the proper method is to bring an action to contest it.¹³

¹ R. S., sec. 5866. Amended 93 O. L. 81, omitting the disability as to persons absent from the state.

² Bradford v. Andrews, 20 O. S. 208; Powell v. Koehler, 52 O. S. 103.

³ Brown v. Griffiths, 11 O. S. 329 (1860).

⁴ R. S., sec. 5861.

⁵ Schmidt v. Bomersback, 64 Ind. 53.

⁶ Schmidt v. Bomersback, *supra*.

⁷ Haynes v. Haynes, 33 O. S. 598.

⁸ Mears v. Mears, 15 O. S. 90.

⁹ Myers v. Barrow, 3 O. C. C. 91.

¹⁰ Andrews v. Administrators, 7 O. S. 143.

¹¹ Fowler v. Young, 19 Kan. 150.

¹² Fowler v. Young, *supra*.

¹³ Mosier v. Harmon, 29 O. S. 220.

* Dew v. Reid, 52 O. S. 519.

Sec. 1208. Petition to contest will on ground that it was made under undue influence.—

The plaintiff shows to the court that on the — day of —, 18—, B. M., of — township, — county, Ohio, the father of plaintiff, died, leaving plaintiff his only child and heir at law.

On the — day of —, 18, a certain paper writing, purporting to be the last will and testament of said B. M., bearing date of the — day of —, 18—, was presented to and admitted to probate by the probate court of said county; that said paper writing remains in said court as a portion of the records thereof. A copy of the same is hereto annexed, marked "Will," as an exhibit. Letters testamentary were issued thereon by said probate court to R. P. as executor, who is now acting as such. By the terms of said paper writing the defendants are named as legatees, and as several devisees of said B. M., deceased.

The plaintiff now avers that the said paper writing is not the last will and testament of said B. M., for said B. M., at the date of said paper writing, and for some years prior thereto, was not of sound mind and memory, but by reason of age and protracted excessive drinking was mentally incapacitated from making a will or a proper distribution of his property, and was persuaded and coerced into signing said paper by the undue influence of the defendant C. M., others conspiring with her, and by the false, fraudulent and collusive representations of said C. M., and by others at her suggestion, influencing and prejudicing the weak mind of said B. M. Some of the said improper means and representations resorted to were as follows: Said C. represented to plaintiff's father that plaintiff spoke disrespectfully of him, had called him vile names — this was false. Plaintiff further says said will was not executed as required by law.

Plaintiff further says that the said paper writing and the bequests therein were procured and made by the exercise by said C. M. of undue influence over the mind of plaintiff's father, so that the paper writing does not, because of such undue influence, speak his wish and will.

Plaintiff therefore prays that an issue be made up and tried as to whether said paper writing is the last will and testament of said B. M.; that said will be set aside; that the same be found and declared not the last will and testament of said B. M., and for such further and other order and relief authorized by law.

M. & C., Attorneys for Plaintiff.

NOTE.— From *Paull v. Mundy*, Supreme Court, unreported. See form in *Wagner v. Ziegler*, 44 O. S. 59. As to evidence necessary where the issue is the capacity of the testator, see *James v. Sutton*, 36 Neb. 393.

Sec. 1209. Petition to contest validity of nuncupative will.—

On or about the — day of —, 18—, M. A. P., the wife of the said G. O. P., died leaving an only child and son, O. I. P., issue of her marriage with the said G. O. P., and her heir at law.

That on the — day of —, 18—, a certain paper writing purporting to be the verbal last will and testament of the said M. A. P., bearing date of the — day of —, 18—, was presented to, and admitted to probate by, the probate court of said county of —, and is recorded in book —, pages —, of the records of wills in said court; no letters of administration or testamentary being issued thereon, and no executor nor administrator thereof, or of the estate of the said M. A. P., having been nominated in said paper nor appointed by said court of probate.

By the terms of said paper writing the defendants, O. D. V., S. V., A. K. V. and A. V., brothers of the said M. A. P. and the said O. I. P., are named as the several legatees of said M. A. P.

Said paper writing is not the last will and testament of the said M. A. P. The said M. A. P. did not make the statements contained in said pretended will, neither did she state, express nor suggest the words, contents or substance thereof, nor the terms thereof, nor any part thereof. Neither did the said M. A. P. call on O. D. V. and E. J. V. nor either of them, nor any one else, to either write or witness the said paper writing, as her last will or otherwise, and in fact was, at the time said pretended will purports to have been made, of unsound mind and memory, and therefore incapable of comprehending the terms or understanding the effect thereof. Said pretended will purports to be subscribed by two witnesses only, to wit, by the said legatee, O. D. V., and E. J. V., who then was and now is his wife.

That the said O. I. P. died under — years of age while yet a young unmarried child, and soon after his mother, said M. A. P., leaving no children nor their legal representatives, nor wife relict to himself, and leaving no brothers nor sisters of the said O. I. P. of the whole blood, nor any their legal representatives, nor leaving any brothers nor sisters of the half blood to the said O. I. P., nor any their legal representatives, but leaving the said contestant, G. O. P., his father and only heir at law.

The plaintiff and contestant therefore prays that an issue be made as to whether said paper writing is the last will and testament of the said M. A. P., and that the same may be set aside, and for other relief.

R. & W., Attorneys.

NOTE.— From *Vrooman v. Powers*, 47 O. S. 181. R. S., sec 5991. A will cannot be valid if one of the witnesses is a legatee thereunder. 47 C. S. 121.

Sec. 1210. Petition to set fraudulent will aside.—

On or about the — day of —, 18—, one W. M. died at —, seized and possessed in fee-simple of the following real estate, situate in and described as follows: [*Description.*]

That the said W. M. died unmarried, and without issue, but leaving the plaintiff his only next of kin and heir at law. That the said W. M. died without having made any disposition of his said estate, or any part thereof, by will or otherwise. That on or about the — day of —, 18—, the defendant D. J., fraudulently intending to cheat and defraud the plaintiff in the premises, falsely and fraudulently wrote and forged a paper in the words and figures following, and purporting to be the last will and testament of said W. M., to wit: [*Copy of will.*]

That on the — day of —, 18—, said paper writing so purporting to be the last will and testament of said W. M., deceased, was presented to the probate court of — county, for probate, and on the — day of —, 18—, one A. B. and C. D. appeared before the said probate court and falsely testified that said W. M. made said paper writing as his last will and testament; and thereby intending to cheat and defraud this plaintiff, the said A. B. and C. D. falsely made oath that they saw the said W. M. make and execute said paper writing as his last will and testament, and that they signed and subscribed their names thereto as witnesses, in the presence of the said W. M. and at his request, when they each well knew that the said W. M. did not make and execute said pretended will, and well knowing the same to be false and forged as aforesaid.

Plaintiff therefore asks that said pretended will may be adjudged false, fraudulent and void, and that all proceedings had thereunder be declared null and void, and that the plaintiff may be restored to all rights in the premises, as the sole heir at law of the said W. M., deceased, the same as if said pretended will had not been admitted to probate, and for all other proper relief.

NOTE.—Adapted from *Fowler v. Young*, 19 Kan. 150.

Sec. 1211. Answer in proceedings to contest nuncupative will.—

That the said will in the petition named is the valid nuncupative last will and testament of the said testatrix, M. A. P., deceased, and that the same was made in her last sickness, was reduced to writing and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words, and was so made when said testatrix was of sound mind and memory and not under any restraint, and that at the time said testamentary words were spoken

she called upon some persons then present to bear testimony to said disposition of her property as her will.

Wherefore said defendants pray that said will may be established as the valid last will and testament of said testatrix, and that they may recover their costs of suit.

A. & A., Attorneys for Defendants.

NOTE.—See *Vrooman v. Powers*, 47 O. S. 191.

Sec. 1212. Answer of legatee in contest of will.—

And now comes M. H., one of the defendants herein, and for answer to petition of plaintiff says that he admits the death of B. M. on —, 18—, and that plaintiff is his only child and heir at law. He further says that said B. M. made a last will and testament, bearing date —, 18—, which was duly admitted to probate, by the probate court of this county, on —, 18—; and that letters testamentary thereon were duly issued to R. P., as executor, who thereupon qualified, and has ever since acted as such. This defendant further says that by said last will and testament of said B. M. he is named as one of the legatees and devisees. Further answering, this defendant denies all the allegations in the petition contained and avers that said B. M. was at the time of making said last will and testament of sound mind and memory; that he was under no undue influence whatever; and that he was not persuaded or coerced into signing said last will and testament, but that he made the same freely and voluntarily.

Wherefore this defendant prays that an issue be made up as to whether said paper writing is the last will and testament of said B. M.; that the same may be declared to be the valid last will and testament of said B. M.; and for all proper relief.

NOTE.—From *Paul v. Mundy*, Supreme Court, unreported.

Sec. 1213. Action to construe will.—A civil action may be maintained under the code by any executor, administrator, guardian or other trustee against the creditors, legatees, distributees or other parties, asking the direction or judgment of the court in any matter respecting the trust, estate or property to be administered, and to have the rights of the parties in interest determined in the same manner and as fully as was formerly done in chancery. If such persons refuse after having been requested, any creditor, legatee, distributee or other person making the request may institute the action.¹ This

¹ R. S., sec. 6202; *Gordon v. Groestine*, 4 O. C. C. 235; *Noble v. Martin*, 1 O. C. C. 320; *Farrar v. Falen*, 4 O. C. C. 365.

action may be maintained only in cases where a trust is involved, or where the executor has some duty to perform in carrying out the provisions of the will. The suit will not be entertained to construe a will upon a state of facts which has not arisen, nor upon a matter which is future and uncertain.¹ An heir at law or next of kin who is hostile to a will cannot maintain the action.² Nor can a person who is not an executor, or in any sense a trustee, ask the instructions or advice of the court. It must be by some one having an interest.³ It is well settled that an executor charged with the execution of a trust may, when he has reasonable doubt as to the disposition of the trust, independently of statute, apply to a court of equity for direction.⁴ The action cannot be brought for the mere purpose of obtaining the opinion of a court upon its construction when no trust is involved.⁵ In an action for the opinion and direction of a court in respect to a trust which has been created for public charitable purposes, the duties of the trustee may be enforced, or the trustee removed and another appointed; but in no event can the heirs assert any title inconsistent therewith.⁶ The petition in an action to obtain construction of a will should state that the testator left property, whether real, personal, or both.⁷ It is said that a court of law is as competent as a court of equity to consider a will or other instrument, when rights sought to be asserted are dependent upon its construction; that heirs claiming as distributees cannot in a separate proceeding, the only purpose of which is the recovery of their distributive shares in the tribunal whose province alone it is to adjust these matters, ask a construction of the will.⁸

¹ Chase v. Isherwood, 1 Toledo Legal News, 128 (Lucas Co. C. P., 1894), citing 3 Pomeroy's Equity, secs. 1156, 1157; Rathgeb v. Mauck, 85 O. S. 508.

² Chipman v. Montgomery, 68 N. Y. 221.

³ Walrath v. Handy, 24 How. Pr. 353.

⁴ Rathgeb v. Mauck, 85 O. S. 508-5.

⁵ Collins v. Collins, 19 O. S. 468;

Corry v. Fleming, 29 O. S. 147; Chipman v. Montgomery, 68 N. Y. 231; Walrath v. Handy, 24 How. Pr. 353.

⁶ Cincinnati v. McMicken, 6 O. C. C. 183.

⁷ Walrath v. Handy, 24 How. Pr. 353.

⁸ Bowen v. Bowen, 88 O. S. 426; R. S., sec. 6195.

Sec. 1214. Petition by executor for construction of will and direction as to distribution.—

The plaintiff says that on the — day of —, 18—, the said N. C., then in full life, and being a resident of — county, Ohio, made and published his last will and testament, and therein and thereby disposed of all his real and personal estate in the manner following—that is to say: [*State manner.*]

That on or about the — day of —, 18—, the said N. C., then a resident of said — county, departed this life, leaving said last will and testament unrevoked and in full force, and also possessed of a large amount of real and personal property, and leaving as his widow the said S. O. C., and the following named persons as his only heirs at law: L. C., B. F. and J. M. C., three of the legatees named in said will; S., one of the legatees named in said will, and now intermarried with and the wife of said R. W. M.; M. B., now M. B. P., also one of said legatees, and the wife of T. F. P.; and E. A., also one of said legatees, and now the wife of F. P. W.; also said W. P., one of said legatees, and a grandson of said N. C., deceased, and now a minor of the age of fourteen years.

On the — day of —, 18—, the said last will and testament was filed in the probate court of said — county, duly proved and admitted to record in said court, and duly recorded; and on the same day the said L. O. C., who is named as executor in said will, was duly appointed and qualified as the executor of said will by said probate court and at once entered upon the duties of his trust.

On the — day of —, 18—, said S. O. C. was, by said probate court, duly appointed the guardian of the person and estate of said W. P.

The plaintiff therefore says: That by reason of the insufficiency of the funds in his hands to pay all the specific legacies in full, and by reason of the indebtedness of said legatees to said estate and the payments aforesaid made by this plaintiff as aforesaid, for the use and benefit of said L. C. C., B. F. C. and J. M. C., and the use and occupancy of said W. and husband of said real estate as aforesaid, and the rents received by the plaintiff, he is unable safely to make distribution under said will or otherwise.

He therefore prays the direction and judgment of the court, a proper distribution of said funds, and the proper construction of said will, and the rights of the several parties in interest, and for all other just and proper relief.

M. & H.,
Attorneys for Plaintiff.

NOTE—From *Hegler v. Priddy*, Supreme Court, unreported.

Sec. 1215. Petition by executor for construction of particular clause of will.—

Plaintiff is the duly appointed and qualified executor of the last will and testament of A. P., deceased, and is now engaged in the active administration of said trust. His intestate died on, to wit, —, 18—, in this county, and his last will and testament and the codicil thereto, a copy of which is hereto attached marked Exhibit A, and made a part hereof, was duly admitted to probate in the probate court of said county on —, 18—.

Said will provides that, after the payment of certain expenses and specific legacies, the executor shall sell all the real estate of which testator died seized, and add to the proceeds thereof whatever may remain of the personalty, and divide the sum into four equal parts, one of which parts is given to a grandson, G. V., and another to his daughter, J. A. S., and then the will proceeds to say: [*Copy of clause to be construed.*]

The will then requests that said E. and I. shall be consulted as to the selections of the real estate to be so purchased for them, and directs that until so invested the fund shall be put at interest on mortgage security, etc.

The said son, I. P., died before the testator, leaving surviving him, as his only heirs at law, the defendants J. P. and M. P. Plaintiff is in doubt as to the true construction of said will, and especially as to the clause above quoted, so far as it concerns the portion set apart to the son I. and his children, in respect to his share. Plaintiff suggests whether it is not the true construction of said will that the direction to invest in land was not for the sole benefit of his said son I., and that since he is now dead, the portion to go to his children may not be paid to them severally in money.

Plaintiff is also in doubt as to the meaning of the word "children" in said clause of the will in reference to I.'s portion — whether it means only his two sons J. and M., who survived both him and the testator, or whether it includes his three said grand-daughters as well.

Wherefore plaintiff asks that said defendants may be required to answer and set up any claims they may have under said will or otherwise in regard thereto, that the same may be determined and settled; and that the court give judgment, and direction in regard to the true construction of said clause of said will, and as to what plaintiff's duties are in the premises, and for all proper relief.

S. & S.,

Attorneys for Plaintiff.

NOTE.— From *Woolley v. Paxson*, Supreme Court, unreported, No. 1018.

Sec. 1216. Answer of guardian in proceedings for construction, claiming property in dispute.—

Now comes A. L. W., guardian of P. W., and represents that on the — day of —, 18—, he was appointed guardian of the person and estate of P. W., the defendant herein, a minor, by the — court of — county, —; that he gave bond as such guardian and is still acting as such. He represents that, at the time of the execution of said will in the petition described by said A. P., there were living the following children of I. P., one of the devisees mentioned in section 8 of said will, to wit: J. P., M. P., etc.; that during the life-time of said testator, but after the execution of said will, the said I. P. died intestate, leaving surviving him, as his heirs at law, J. P., M. P., the children of N. O. and P. W., the only child of said E. W., deceased, and who died intestate, and that all of said heirs are still living. Plaintiff further represents that under said will he is entitled, as the guardian of said P. W., to the share of said estate which would have passed to the mother of said P. W. had she survived.

Wherefore he prays that upon the final hearing of said cause the said will of said A. P. may be so construed as to vest in this defendant as such guardian the share of the said E. W., deceased, and for such other and further relief as the nature of the case may require.

NOTE.— From *Woolley v. Paxson*, Supreme Court, unreported, No. 1018.

RELIEF AFTER JUDGMENT.

CHAPTER 93.

Sec. 1217. Relief after judgment—
How obtained.

1218. Same continued—Grounds
of relief.

Sec. 1219. Formal parts of petition to
vacate judgment.

Sec 1217. Relief after judgment. — How obtained.— Adequate remedy is provided for relief after judgment by which the court of common pleas or circuit court may vacate or modify its own judgment after the term at which it was rendered.¹ The manner of proceeding to obtain this relief depends upon the grounds upon which it is based. If it is desired to correct mistakes or omissions of the clerk, or an irregularity in obtaining a judgment or order, the course marked out by the code is to file a motion for that purpose. The motion should be placed on the motion docket and heard as other motions, after reasonable notice thereof is given to the adverse party or his attorney.² A motion to vacate a judgment because of its rendition before the action regularly stood for trial can be made only in the first three days of the succeeding term.³

When relief is asked upon any of the other enumerated grounds it must be in the form of a petition, duly verified, setting forth the judgment or order, and the grounds upon which it is claimed it should be modified or vacated. If the party filing the petition was a defendant in the action against which he is seeking relief, he must state his defense thereto. A summons must be issued upon the filing of the petition and regularly served as in the commencement of an action.⁴ A person

¹ O. Code, sec. 5354.

² O. Code, sec. 5357.

³ O. Code, sec. 5357.

⁴ O. Code, sec. 5353.

making application for relief under this provision submits himself to the jurisdiction of the court and is bound by any judgment that may be rendered.¹ It is a special proceeding, however, from which error may be prosecuted.²

The course to be pursued by the court in the hearing of the matter is to first try and decide upon the grounds to vacate a judgment or order before trying or deciding upon the validity of the defense or cause of action.³ A judgment cannot be vacated until it is adjudged that there is a valid defense.⁴ In some cases the question to be tried and determined may be decided by an inspection of the record, and in others by the testimony of witnesses. In all cases the question as to the right to relief must be tried and decided by the court; and when it is found that a ground exists for the vacation or modification of a judgment, the case is not then ready for a final judgment of vacation or modification. If the proceeding to vacate be by motion, the party seeking relief should then be required to file his answer to the original petition, and the case would then proceed. If by petition, in which matters of defense are set forth in issuable form, an issue may be taken by demurrer or reply. If the issue is thus made up, the case must be tried as in other cases.⁵ This, however, is not the ordinary course to be pursued. The merits of the grounds for vacation or modification should first be determined, and then the issues as to the validity of the alleged defense should be made up by proper pleadings, and tried as in other cases.⁶ The court should not, after having found grounds for the vacation of a judgment or order, proceed to adjudge the validity of a defense thereto when a right to trial by jury existed therein.⁷ A person seeking relief under this provision may obtain an injunction suspending the proceedings against which relief is sought.⁸

Sec. 1218. Same continued — Grounds of relief.—As the design is merely to briefly point out the mode of procedure under this provision, it is not necessary to here state the

¹ *Watson v. Paine*, 25 O. S. 340.

² *Taylor v. Fitch*, 12 O. S. 162.

³ O. Code, sec. 5352.

⁴ O. Code, sec. 5360.

⁵ *Watson v. Paine*, 25 O. S. 345.

⁶ *Watson v. Paine*, 25 O. S. 340.

⁷ *Watson v. Paine*, 25 O. S. 340;
Frazier v. Williams, 24 O. S. 625.

⁸ O. Code, sec. 5361.

grounds upon which relief may be based, or the adjudications touching upon these various grounds, as that has been well done by another.¹ A minor may, at any time within one year after his arrival at the age of majority, seek relief under this provision.² Proceedings to vacate or modify a judgment or order upon the ground of fraud, or for erroneous proceedings against an infant or person of unsound mind, or because of unavoidable casualty or misfortune preventing the party from prosecuting or defending, must be commenced within two years after the rendition of the judgment or order complained of; and for mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order within three years, and for judgments upon warrants of attorney for more than was due, when defendant was not summoned or otherwise legally notified within two years after notice, and when the judgment or order was obtained upon false testimony the proceedings may be commenced after the guilty party is convicted, if conviction be within two years from the rendition of the judgment.³

Sec. 1219. Formal parts of petition to vacate judgment.

[*Caption.*]

Plaintiff states that at the — term, 18—, of the court of common pleas of — county, Ohio, in a certain cause therein pending, wherein — — was plaintiff and this defendant was defendant, the said A. B. recovered a judgment against this plaintiff for the sum of \$— [*or state nature of judgment*].

That said judgment was rendered [*state any grounds under sec. 6354*].

That the plaintiff had a valid defense to said action, to wit: [*State defense.*]

Plaintiff therefore asks that the said judgment so rendered by said court in said action on the — day of —, 18—, be vacated and annulled, and that the plaintiff herein be allowed to set up his defense thereto that he may have the same determined and adjudged, and for all other relief as may seem proper.

¹ Whittaker's Ohio Civil Code,
pp. 242-243.

² O. Code, sec. 5380.

³ O. Code, sec. 5363.

APPEAL AND ERROR.

Sec. 1220. Introductory.—Judgments when duly rendered cannot be collaterally impeached except upon a question of jurisdiction, and are conclusive between the parties.¹ For this reason it is highly important that a judgment or decree should be as nearly correct as it is possible for it to be. To this end provision is made for review. When a judgment has been erroneously rendered which affects substantial rights, the injured party may have the same reviewed by error or retried by an appellate court, according to the nature of the case. It is one of the most important features of our jurisprudence that ample provision is made for reviewing and correcting prejudicial errors.

The word “appeal” does not have the same meaning in all jurisdictions. It was unknown at common law,—writs of error and *certiorari* answering the same purpose. In American jurisprudence like systems are differently named, thereby causing some confusion. In some states “appeal” means the same thing as “error” in other states—that is, errors are reviewed under the erroneous name of appeal; while others adopt appeal in its proper sense, as transferring a case to a higher court for a trial *de novo*, and a petition in error to review errors committed, which will be treated in the succeeding chapters in the order named. Because of the difference in systems, the treatment of these two subjects must be confined to the procedure in Ohio, though the general principles may be applicable where a like system prevails.²

¹ *Ludlow v. Kidd*, 3 O. 541; *Anderson v. Same*, 8 O. 108; *Kingsborough v. Tousley*, 56 O. S. 450.

² Read instructive opinion by Justice Swan, in *Grant v. Ludlow*, 8 O. S. 1, 29, 30.

CHAPTER 94.

APPEAL.

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| <p>Sec. 1221. Appeal defined and explained.</p> <p>1222. What courts have appellate jurisdiction in Ohio</p> <p>1223. Right to appeal to court of common pleas—How determined.</p> <p>1224. Right to appeal from the common pleas to the circuit court—How determined.</p> <p>1225. The same—Right to appeal depends upon character of relief sought.</p> <p>1226. Same continued—Appeal in foreclosure proceedings.</p> <p>1227. Only final orders may be appealed from.</p> <p>1228. Who may appeal—Parties.</p> <p>1229. Appellate jurisdiction of court of common pleas.</p> <p>1230. Appellate jurisdiction of circuit court.</p> | <p>Sec. 1231. Notice of appeal must be given.</p> <p>1232. Appeal bond, when given—General requisites.</p> <p>1233. Appeal of separate interests.</p> <p>1234a. Staying execution.</p> <p>1234b. Suspension of judgment.</p> <p>1234c. Pleading and practice on appeal—Transcript to be filed.</p> <p>1234d. Pleading and practice—Appeals from justice.</p> <p>1234e. Pleading and practice—Appeals from probate court.</p> <p>1234f. Pleading and practice—Appeals from common pleas to circuit court—New pleadings—Parties—Amendments.</p> <p>1234g. Same continued—Objections raised in appellate court.</p> <p>1234h. The mandate.</p> |
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Sec. 1221. Appeal defined and explained.—An appeal is a proceeding by which a case is transferred from one court to another higher court to be tried *de novo*, that is, upon the same pleadings and same evidence as in the lower court, although other and additional testimony may be introduced in the appellate court. As soon as the appeal is perfected, the whole case, with all the issues, is transferred to the appellate court for retrial.¹ The entire case, and not merely errors committed by the inferior court, is transferred.

¹Long v. Hitchcock, 3 O. 274; v. Hewett, 1 O. S. 511; Brewster v. Brown v. Kuhn, 40 O. S. 468; Taff Anderson, 1 O. C. C. 482.

As appeals are regulated in the various jurisdictions by particular statutes, the subject must necessarily be here treated with reference to special provisions. In some states appellate proceedings serve the purpose of a review of errors. In Ohio a separate proceeding is provided for the express purpose of reviewing errors. And when a party is dissatisfied with the first trial, in those cases in which the right to a trial by jury does not exist, he may appeal the case to a higher court, and the trial is conducted in the same manner as in the inferior court.¹

Sec. 1222. What courts have appellate jurisdiction in Ohio.—In Ohio appeals may be taken, in all cases which are appealable,² from the common pleas court to the circuit court,³ from the probate court to the common pleas,⁴ and from the justice's court to the court of common pleas.⁵ The only courts, therefore, having appellate jurisdiction in Ohio are the court of common pleas and circuit court, the nature and extent of which will be found in the next succeeding sections.

Sec. 1223. Right to appeal to court of common pleas—How determined.—While the right to appeal in all cases may depend upon statutory enactment, there is no general rule provided by statute governing appeals from justice's and mayor's courts in the same sense that there is from the common pleas to the circuit court. The appellate jurisdiction of the court of common pleas depends upon a number of statutory provisions which are given in the next section.

Sec. 1224. Right to appeal from the common pleas to the circuit court—How determined.—The test by which the right to appeal to the circuit court is prescribed by statute as follows:

"In addition to the cases and matters specially provided for, an appeal may be taken to the circuit court, by a party or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction, *if the right to demand a jury did not exist, etc.*"⁶

Only those cases can be appealed in which the right to demand a jury therein does not exist.⁷ Where the relief demanded is a money judgment, or the recovery of specific real or personal property, a right to trial by jury exists;⁸ and in all other cases or issues of

¹ O. Code, sec. 5225.

² See sec. 1233, *post*.

³ O. Code, secs. 5225-26.

⁴ R. S., sec. 5934. See *Haynes v.*

Haynes, 33 O. S. 598.

⁵ R. S., secs. 6562, 6563, 6566.

⁶ O. Code, sec. 5226.

⁷ O. Code, sec. 5226.

⁸ O. Code, sec. 5130; *Gunsallus v. Pettit*, 46 O. S. 27.

fact, as where equitable relief is asked, this right does not exist.¹ This is merely enacting the common-law rule that actions at law were tried by a jury, and equitable suits by the court. So the right to appeal or prosecute error is governed by the same principles as under the old practice. In those cases where only a money judgment is asked in which the right to a trial by jury exists, the remedy of the aggrieved party is by proceedings in error. Where a money judgment is not sought, but equitable relief, and the right to a trial by jury does not exist, then an appeal may be taken.² The right to appeal may be waived where a party accepts some benefit under a judgment,³ although where the court has deducted usurious interest from a money judgment and the plaintiff has received the amount of the judgment, he may take an appeal.⁴

Sec. 1225. The same—Right to appeal depends upon character of relief sought.—The right to appeal depends upon the same principles which have been discussed in a former chapter on The Mode of Trial.⁵ The reader is asked to consult that chapter in this connection.

It is well settled that the right to appeal depends upon the nature and character of relief sought,⁶ rather than upon the form of the judgment rendered.⁷

The right to appeal those cases which are not governed by special statutes is determined in exactly the same manner as is the mode of trial. Only civil actions in which the right to demand a jury are considered in this section.

1. In cases where a legal and equitable cause of action are joined, we concluded that the parties had a right to separate trials of each cause of action, the legal cause to a jury, and the equitable cause to the court, unless one of the causes be incidental or so related, dependent or connected with the other, as that one cause may be paramount to the other,⁸ so that the right to appeal or to go up on error would be governed by the paramount relief. If the two causes of action do not sustain such a relation, so that the relief asked in either can not be considered as incidental or dependent upon the other, then an appeal may be taken from

¹ O. Code, sec. 5131.

² *Tufts v. Haynie*, 4 O. C. C. 494. Where the primary relief sought is equitable, the trial of issues of fact by jury is not a matter of right, and judgment thereon is appealable. *Rowland v. Entekin*, 27 O. S. 47.

³ *Neel v. Toledo*, 5 O. C. C. 203;

Carll v. Oakey, 97 N. Y. 633; *Tabler v. Wiseman*, 2 O. S. 208.

⁴ *Beals v. Lewis*, 43 O. S. 220.

⁵ *Ante*, Ch. 10-A.

⁶ *Gunsaulus v. Pettit*, 46 O. S. 27;

Black v. Boyd, 50 O. S. 46.

⁷ *Hull v. Bell*, 54 O. S. 228.

⁸ *Ante*, sec. 137-4.

the final disposition of the issues upon the equitable cause, while error will lie from the action of the court on the legal cause of action. The fact that the court is invested with the discretion to refer the issues in the equitable cause to the jury with the issues in the legal cause, alluded to in a former section,¹ does not affect the right to appeal in the equitable cause.

2. Where a defendant interposes a *defense* merely to either a legal or equitable cause of action, whether the *defense* be legal or equitable, and though it may, if true, extinguish plaintiff's cause of action, it will not affect the mode of trial, and whether there is a right to appeal in such case depends upon the nature of the plaintiff's cause of action.

But if the defendant sets up a counter-claim, set-off, or new matter which might be the subject of a cause of action in favor of the defendant against the plaintiff, which is equitable in its nature, then there may be an appeal from the final disposition of the issues raised on such claims of the defendant. If the defendant's claim prevails and is of such character that it will dispose of the entire case, then the court should dismiss the petition of plaintiff.

It may be that in such cases the plaintiff may go up on error or appeal from the order directly affecting his petition, according to the nature of his cause of action.²

Although it seems to the author that the act of the court was confined to the issues raised upon the defendant's claim, and that the plaintiff can only complain thereof, and if he desires to go up to a higher court, he must do so by appeal or error, as the case may be—from the action of the court on the defendant's claim.³

3. Where there is a single cause of action contained in a petition in which both legal and equitable relief is asked, then the right to appeal or go up on error depends upon what the paramount or principal relief is. Where, therefore, the character of the relief is primarily for money, and to aid that relief equitable powers are invoked, as where a money judgment is rendered for money had and received in trust, and the court orders it to be a lien upon the land, it adds nothing to the relief except security.⁴

But where the prayer for money is not paramount, and in order to administer full and complete relief, it becomes necessary

¹ *Ante*, sec. 137-3.

² *Alsford v. Reed*, 45 O. S. 653.

³ Upon this point, see *Buckner v.*

Mear, 26 O. S. 514; *Rankin v. Hannan*, 37 O. S. 113.

⁴ *Gunsaulius v. Pettit*, 46 O. S. 27; *Ante*, sec. 137-4.

to adjust accounts between parties, then it may be considered a case calling primarily for equitable relief and is therefore appealable.¹

It is the well-settled rule that where the primary relief is for money, though equitable relief is asked, it is not an appealable action;² as where a money judgment is demanded and an accounting is asked which is incidental;³ or where personal judgment and the enforcement of a lien is asked;⁴ or an action by one surety to recover from a co-surety one half of a judgment which plaintiff was compelled to pay.⁵

Sec. 1226. Same continued—Appeal in foreclosure proceedings.—Continuing the discussion of the nature of relief as governing the right of appeal as applicable to foreclosure proceedings, the same difficulty is encountered as in a preceding chapter upon the right to trial by jury in such cases.⁶ It is well understood that where a money judgment is all that is sought, either party is entitled to a jury, and no appeal can be had from the judgment rendered.⁷ And as already stated in substance,⁸ where other equitable relief is required not entitling a party to an appeal, which goes beyond a mere money judgment, and the equitable element is controlling, then either party may appeal from a judgment rendered against him.⁹

What, then, is the rule with reference to the foreclosure of mortgages? There can be no doubt that when a petition in foreclosure prays primarily for a personal judgment, and issues of fact are joined, the equitable relief is incidental and not primary, and it is a case for a new trial and not appeal, even though no personal judgment is rendered.¹⁰ And where the suit is against a mortgagor and his grantee, the latter not being personally liable, and interested only in the equitable relief, may appeal from a decree against him, notwithstanding a personal judgment be asked against the mortgagor.¹¹

¹ Black v. Boyd, 50 O. S. 46; Barndt Lee, 45 O. S. 356; Brundridge v. Albertson, 51 O. S. 569. Goodlove, 30 O. S. 374; Averill Coal,

² Brundridge v. Goodlove, 30 O. S. etc., Co. v. Verner, 22 O. S. 372. 374; Cory v. Gaynor, 21 O. S. 277. ⁸ *Ante*, sec. 1225.

³ Chapman v. Lee, 45 O. S. 356; ⁹ Alsdorf v. Reed, 45 O. S. 653-56; Fish v. Palace Car Co., 6 O. C. C. 310. Black v. Boyd, 50 O. S. 46; Rowland

⁴ Mitchell v. Drake, 7 O. C. C. 308; v. Entekin, 27 O. S. 47; Ellsworth Scott v. Hewett, 7 O. C. C. 5. v. Holcomb, 28 O. S. 66; Fleming v.

⁵ Koelsch v. Mixer, 5 O. C. C. 404. Kerkendall, 31 O. S. 568. See Elliott's App. Proc., sec. 39. See McCrory v. Parks, 18 O. S. 1.

⁶ See *ante*, sec. 586.

⁷ *Ante*, sec. 1225; Dunn v. Kammacher, 26 O. S. 497; Chapman v. Ladd v. James, 10 O. S. 437.

¹¹ Fleming v. Kerkendall, 31 O. S. 568.

If the primary relief sought be the enforcement of the mortgage lien, personal judgment not being asked, then the case is an appealable one.¹ And if a prayer for a personal judgment be withdrawn before trial, it is then appealable.² But supposing the primary relief be the enforcement of the lien, and the defendant sets up a cause of action, such as payment or other defense, presenting an issue of fact, which, if established, will extinguish the equitable cause of action set up by the plaintiff; or, in other words, defeat his right to enforce the lien—what is the course of procedure? In such case it is held that the defendant has a right to a trial by jury upon his legal cause of action, and that the plaintiff may appeal from a decree dismissing his petition, upon which appeal, however the issues joined and tried in the inferior court upon the legal cause of action can not be opened up.³ And so the converse of this rule has been held, that where an equitable cause of action be set up which extinguishes a legal cause of action, then an appeal may be taken.⁴ But it has been held in *Alsdorf v. Reed*,⁵ that where the prayer is for an ordinary decree of foreclosure and order of sale, it may be appealed from by either party, even though an issue of fact be raised by the defendant, such as payment.⁶ The logical rule to be deduced from recent and earlier holdings, taken and considered together, therefore, is that where in foreclosure proceedings the primary relief sought is a personal judgment, it is a case for a second or new trial, the enforcement of the lien being incidental, and no appeal can be taken therefrom. But where the principal relief is foreclosure and sale, then it is appealable,

¹ *Alsdorf v. Reed*, 45 O. S. 653.

² *Grapes v. Barbour*, 39 W. L. B. 109; 58 O. S. 669.

³ *Salladay v. Webb*, 2 O. C. C. 553.

⁴ *Buckner v. Mear*, 28 O. S. 556.

⁵ 45 O. S. 653.

⁶ *Alsdorf v. Reed*, 45 O. S. 653.

But it will be noted that in the case of *Alsdorf v. Reed* the question of payment was submitted to a jury, which found in favor of the defendant, upon which the trial court rendered judgment dismissing the petition. Thereupon the plaintiff

appealed, which he had a right to do so far as the dismissal of his petition was concerned, and this question, the court states, was all that was before it; and it was held that this right existed. But the court further holds that neither party had the right to a trial by jury, thus holding it to be a case only for appeal. But if his case was tried upon appeal, none of the issues submitted to the jury could have been tried. *Salladay v. Webb*,

2 O. C. C. 553.

even though the defendant sets up a legal defense, such as payment, which may, as it did in *Alsdorf v. Reed*, extinguish the plaintiff's right to foreclose. The general principles discussed elsewhere as to the mode of trial are applicable as well to foreclosure proceedings.¹

Sec. 1227. Only final orders may be appealed from.—

An appeal can only be taken from a judgment or final order in a civil action,² and not merely from the various interlocutory orders upon motions, unless such orders finally dispose of the case or affect a substantial right, as the dismissal of a case for want of service and for payment of costs;³ or unless it be an order dissolving a provisional injunction,⁴ as appeals may be taken from such orders. An appeal from such an interlocutory order does not transfer the whole case to the appellate court for trial of the issues joined by the pleadings, but the hearing is limited only to the matter appealed from.⁵

Sec. 1228. Who may appeal—Parties.—The statute permits "a party or other party directly affected" to take an appeal.⁶

How a party may be directly affected so as to have the right to take an appeal must depend upon the circumstances and the substantive rights of parties in particular cases. The right of persons to be made parties to an action even for the purpose of taking an appeal for the protection of their rights, must be determined according to the law of parties, and it is not necessary to further discuss these questions here.⁷ It has been held that a judgment ordering the cancellation of a lease of a railroad, executed by its owner to another company, is a judgment directly affecting the stockholder of the lessor company, so as to confer the right upon such stockholder to take an appeal when the company refuses to do so.⁸

¹ See *ante*, sec. 137-7.

² O. Code, secs. 5226, 5706.

³ *Evans v. Iles*, 7 O. S. 233.

⁴ O. Code, sec. 5226; *Trustees v. McClannahan*, 53 O. S. 403.

⁵ *Trustees v. McClannahan*, *supra*.

⁶ R. S. sec. 5226.

⁷ *Ante*, chap. 2, sec. 8b, *post*.

⁸ *Henry v. Jeans*, 47 O. S. 116.

Sec. 1229. Appellate jurisdiction of court of common pleas.—An appeal may be taken to the court of common pleas from a magistrate's court in cases where either plaintiff or defendant claims more than twenty dollars; but not from a case where the sum claimed is less than twenty dollars, if tried to a jury.¹ In all other cases not otherwise specially provided for by law an appeal may be taken.² But it cannot be taken from a judgment rendered on confession before a justice, or in an action for the forcible entry and detention, or forcible detention of property, or in trials for the right of property under the statutes, either levied upon by execution or attached.³ It is held, however, that an action of replevin may be appealed, and that there is no restriction as to the amount or value of the property.⁴ If judgment be rendered for a greater sum than one hundred dollars in an action for trespass to realty, it cannot be appealed.⁵ Nor can an appeal be taken from a justice in a case in which he had no jurisdiction.⁶ But if, in such a case, the defendant appears in the appellate court and pleads, he cannot deny that he is not in court.⁷ And so, where a judgment is rendered upon defective service and the defendant appears and gives notice of appeal, he thereby submits himself to the jurisdiction of the court.⁸

An order made by a justice improperly dismissing an action may be appealed from.⁹ Upon the question whether or not appeal lies from a judgment taken by default before a justice, there is some conflict. In Ohio it is held that an appeal may be taken, and such is the practice;¹⁰ while the contrary is held elsewhere.¹¹ Appeals may also be taken from the decision of

¹ R. S., secs. 6562, 6596; *Glover v. Moses*, 18 O. 321; *Perkins v. White*, 36 O. S. 530; *Andrew v. Connelly*, 6 W. L. B. 774.

² R. S., sec. 6583.

³ R. S., sec. 6596.

⁴ *Martin v. Armstrong*, 12 O. S. 549. An appeal was taken in *Gaiser v. Van Heim*, 8 O. C. C. 120. *Cobbey on Replevin*, sec. 1236 et seq.

⁵ *O'Neal v. Blessing*, 34 O. S. 33.

⁶ *Nichol v. Patterson*, 4 O. 200. See *Norton v. McLeary*, 8 O. S. 209, 310.

⁷ *Harrington v. Heath*, 15 O. 433-7; *Bisher v. Richards*, 9 O. S. 495; *Thomas v. Pennrich*, 28 O. S. 55; *Van Dyke v. Rule*, 49 O. S. 530, and cases cited; *O'Neal v. Blessing*, 34 O. S. 33.

⁸ *Fee v. Iron Co.*, 13 O. S. 563.

⁹ *Railroad Co. v. District Court*, etc., 33 Pac. Rep. 673 (Nev., 1893).

¹⁰ *Goldsborough v. Bolenbaugh*, 8 O. C. C. 533. See *Wood v. O'Farrell*, 19 O. S. 437.

¹¹ *Clendenning v. Crawford*, 7 Neb. 474.

a mayor of a city or village, in civil cases, in the same manner as from justices of the peace. If a city or village extends into two or more counties, the appeal may be taken to the court of common pleas of the county in which one or more of the defendants reside.¹ An appeal may be taken from the decision of appraisers in laying out and establishing a free turnpike road;² and in all prosecutions in reference to canals, in the same manner as appeals are allowed in civil cases;³ from the probate court in appropriation proceedings,⁴ or in the allowance of claims against the estate of a decedent;⁵ or from any final order, judgment or decree made by such court by any person affected thereby;⁶ as a finding upon exceptions to an inventory;⁷ or in admitting a destroyed will to record;⁸ or from any order, decision or judgment of the probate court in settling the accounts of administrators, guardians, trustees and assignees, trustees and commissioners of insolvents; in proceedings for the sale of real estate; in proceedings with reference to the allowance to a widow; or against persons suspected of having concealed, embezzled or conveyed away property of deceased persons; in cases for the completion of contracts; or from an order or decision in the administration of an insolvent's estate; or proceedings to appoint guardians or trustees for lunatics, idiots, imbeciles or drunkards;⁹ or from the refusal to admit a will to probate;¹⁰ but not from a refusal to admit an authenticated copy of a foreign will to record.¹¹ An appeal may be taken from an order of the probate court overruling a motion of an imbecile ward to terminate the guardianship.¹²

Sec. 1230. Appellate jurisdiction of circuit court.—The appellate jurisdiction of the circuit court of Ohio is such only as is expressly conferred by statute.¹³ The Ohio code confers appellate jurisdiction upon that court; in addition to cases specially provided for, where a judgment or final order is made by the court of common pleas in a civil action of which

¹ R. S., sec. 1752.

² R. S., sec. 4784.

³ R. S., sec. 7887.

⁴ R. S., secs. 2254-2259.

⁵ R. S., sec. 6101.

⁶ R. S., sec. 6203.

⁷ R. S., sec. 6024.

⁸ R. S., secs. 5949-5952.

⁹ R. S., secs. 6407, 6381.

¹⁰ R. S., sec. 5934.

¹¹ R. S., sec. 5934.

¹² *Hiett v. Nebergall*, 45 O. S. 702.

¹³ *Atwood v. Whipple*, 48 O. S. 306.

the latter court had jurisdiction, if the right to demand a jury did not exist, and from an interlocutory order made by the common pleas court, or a judge thereof, dissolving an injunction, in a case of which it had original jurisdiction.¹ An appeal may be taken in an action to stay waste and compel an account;² or from an action for an accounting among sureties;³ or of rents and profits between co-tenants;⁴ or from a decree entered upon the hearing of a master's report;⁵ or from a final order granting or refusing alimony, though not temporary alimony;⁶ or from divorce where the petition is dismissed without a hearing;⁷ or from a final judgment in a suit to enforce the allowance of a claim by an assignee of an insolvent debtor;⁸ or from an action for the assignment of dower;⁹ or to enforce a lien for an assessment;¹⁰ or an action by executors to obtain the judgment of the court upon the provisions of a will;¹¹ or a suit to compel an assignee of creditors to allow a claim.¹² A stockholder of a corporation may, when the judgment against the corporation affects him, appeal therefrom as one directly affected.¹³ An appeal may be taken from *mandamus* proceedings;¹⁴ or from an action for the reformation of a contract, even though a money judgment be demanded, if dependent upon the equitable relief sought;¹⁵ or an action to impeach a decree for fraud;¹⁶ or a suit in partition,¹⁷ whether it invokes equitable

¹ O. Code, sec. 5226; *Atwood v. Whipple*, 48 O. S. 808. Not from an order of modification. *Forgy v. Railroad Co.*, 1 O. C. C. 417. It is only in cases where the court of common pleas had original jurisdiction.

² *Jenks v. Langdon*, 21 O. S. 362.

³ *McCrory v. Parks*, 18 O. S. 1.

⁴ *Conard v. Conard*, 88 O. S. 467.

⁵ *Evans v. Dunn*, 26 O. S. 439.

⁶ O. Code, sec. 5706; *Taylor v. Taylor*, 25 O. S. 71; *Braehle v. Same*, 7 W. L. B. 135.

⁷ O. Code, sec. 5706; *Meyer v. Meyer*, 4 W. L. B. 368.

⁸ *Bank v. Little*, 4 O. C. C. 195.

⁹ *Corry v. Lamb*, 48 O. S. 890.

¹⁰ *Corry v. Gaynor*, 21 O. S. 277.

¹¹ *Swing v. Townsend*, 24 O. S. 1; *Collins v. Collins*, 40 O. S. 353.

¹² *Kennedy v. Thompson*, 8 O. C. C. 446; *Bank v. Little*, 4 O. C. C. 195; *Gordon v. Walton*, 8 O. C. C. 433.

¹³ *Henry v. Jeanes*, 47 O. S. 116; O. Code, sec. 5226. See *Harpold v. Stobart*, 46 O. S. 397.

¹⁴ *State ex rel. Bowersock*, 1 O. C. C. 127; *Dutton v. Hanover*, 42 O. S. 215; *State, ex rel., v. Commissioners*, 15 C. C. 40; *contra*, *State, ex rel., v. Smiley*, 14 C. C. 660.

¹⁵ *Ellsworth v. Holcomb*, 28 O. S. 66.

¹⁶ *Coates v. Bank*, 28 O. S. 415; *Reed v. Reed*, 25 O. S. 422.

¹⁷ *Stableton v. Ellison*, 21 O. S. 527; *Rush v. Rush*, 29 O. S. 440; *Linton v. Laycock*, 33 O. S. 128; *Stone v. Doester*, 7 O. C. C. 8; *Swihart v. Same*, 7 O. C. C. 388; *Barr v. Chapman*, 7 O. C. C. 364.

jurisdiction or not;¹ or a decree rendered in a purely equitable controversy arising on a cross-petition.²

An appeal can not be taken from a judgment upon an award;³ nor from an order confirming or refusing to confirm a sale;⁴ nor from an action to vacate a judgment;⁵ nor in proceedings to contest a will;⁶ nor from an interlocutory order modifying an injunction;⁷ nor from a final order or judgment confirming a commissioner's report in partition proceedings and adjudging the payment of costs and attorney's fee.⁸

A case can not be appealed to the circuit court which does not originate in the court of common pleas.⁹

Sec. 1231. Notice of appeal must be given.—It is necessary in some cases, though not in all, that notice of an intention to appeal be given in the court from which the appeal is taken. It does not appear to be necessary in an appeal from a justice's court, and in certain cases in the probate court;¹⁰ nor is it essential that a person required to give bond should also give notice of his intention by an entry made upon the journal.¹¹ But in cases where the party appealing is not required to give bond, he must give a written notice to the court of his intention to appeal within the time limited for filing the bond.¹² So it is necessary in an appeal from appropriation proceedings from the probate court,¹³ and in appeals from the common pleas court to the circuit court.¹⁴ The notice must be entered upon the journal of the court during the term,¹⁵ and it is not sufficient if merely entered on the docket¹⁶ or upon the calendar of the judge,¹⁷ or left with the clerk at his residence.¹⁸ The notice must be given within three days after the judgment is entered¹⁹ or the appeal will be dismissed, even though a motion for a new trial is not disposed of.²⁰ An omission to give the notice can not be supplied by a *nunc pro tunc* entry.²¹ Where several parties are claiming priority in a fund and the interposition of a court of equity is necessary to determine the same, notice of appeal must be given by all parties necessary to the determination of the controversy.²² But where an

¹ McRoberts v. Lockwood, 49 O. S. 374.

² Massie v. Stradford, 17 O. S. 596; Spence v. Basey, 34 O. S. 42; or upon an equitable defense, Sheefel v. Murty, 30 O. S. 50.

³ Moore v. Boyer, 42 O. S. 312.

⁴ Reeves v. Skenett, 13 O. S. 574.

⁵ Taylor v. Fitch, 12 O. S. 189.

⁶ R. S., sec. 5865.

⁷ Forgy v. Railroad Co., 1 O. C. C. 417.

⁸ Jordan v. Jordan, 8 O. C. C. 431.

⁹ Clark v. Hanna, 8 O. S. 199; Norton v. McCleary, 8 O. S. 205.

¹⁰ R. S., sec. 6408.

¹¹ Keck v. Douglass, 6 O. C. C. 649.

¹² Keck v. Douglass, *supra*.

¹³ R. S., sec. 2255.

¹⁴ R. S., sec. 5227.

¹⁵ R. S., sec. 5227; Landon v. Reid, 10 O. 202; Bradford v. Watts, W. 495.

¹⁶ Moore v. Brown, 10 O. 198.

¹⁷ Humphrey v. Birchtoled, 1 Clev. Rep. 89; Bank v. Bowsher, 15 C. C. 114.

¹⁸ Taylor v. Wallace, 2 W. L. B. 115.

¹⁹ Whittaker's Ohio Civ. Code (4th Rev. ed.), p. 202; Parker v. Sampson, 13 O. C. C. 660.

²⁰ Twenty-fourth Ward Loan Co. v. Joseph, 8 O. C. C. 227. It is held in Indiana that if an appellant has failed to give notice, the appeal will not be dismissed, but an opportunity will be afforded to correct it. Huttis v. Martin, 131 Ind. 1.

²¹ Bank v. Bowsher, 15 C. C. 114.

²² Means v. Clark, 7 O. C. C. 276.

appeal has been taken by one or more parties to an action, a motion cannot be entertained to dismiss others who have not given notice and who have not appeared in the appellate court in any manner, or assumed to be parties therein.¹ The notice is given in the entry of the judgment on the journal.²

Sec. 1232. Appeal bond, when given—General requisites.

A party in any trust capacity, such as guardian, executor or administrator,³ who has given bond with sureties according to law, is not required to give bond and security to perfect an appeal.⁴ In taking an appeal in a case in which an executor has a personal interest, however, the executor must give a bond;⁵ and so with a non-resident executor.⁶ A wife need not give a bond in an appeal by her from a decree for alimony.⁷ The bond in a case appealed from a magistrate's court must be given within ten days from the rendition of the judgment, in a sum double the amount of the judgment and costs.⁸ And in appeal in some cases⁹ from the probate court to the common pleas, it must be filed within twenty days;¹⁰ if from the allowance or rejection of a claim of an executor or administrator, the bond must be filed in twelve days;¹¹ if from appropriation proceedings, within twenty days;¹² and in the same time in an appeal from the decision of appraisers in assessments for turnpike roads.¹³ In an appeal from the court of common pleas to the circuit court the bond must be filed within thirty days after the entry of the judgment.¹⁴ A bond executed within thirty days after an additional term, but not within thirty days after the term at which the judgment was rendered, is not within proper time.¹⁵ In computing the time when an undertaking must be filed, the first day must be ex-

¹ *Barr v. Chapman*, 7 O. C. C. 365.

² Form of entry: "And said plaintiff or defendant gave notice of his intention to appeal this action, and the court fixes the amount of the appeal bond at — dollars." 6 O. C. C. 649.

³ R. S., sec. 2256.

⁴ O. Code, sec. 5228; *Sproats v. Cutler*, W. 157; *Ulery v. Ulery*, W. 681. Executor or administrator. *Dennison v. Talmage*, 29 O. S. 433. Cf. *Bolton v. Rolo*, 1 *Clev. Rep.* 9.

⁵ *Taylor v. McCullom*, 5 W. L. B. 414.

⁶ *Work v. Massie*, 6 O. 503; *Dennison v. Talmage*, 29 O. S. 433.

⁷ O. Code, sec. 5706.

⁸ R. S., secs. 6584, 594.

⁹ R. S., sec. 6407.

¹⁰ R. S., sec. 6408.

¹¹ R. S., sec. 6101.

¹² R. S., sec. 2255.

¹³ R. S., sec. 4784.

¹⁴ O. Code, sec. 5227; 89 O. L. 145.

¹⁵ *Harris v. Gest*, 4 O. S. 402.

cluded and the last included.¹ The recitals of a bond cannot be taken as conclusive proof as to when the judgment was rendered, as that must be determined by the transcript.² A deposit in bank cannot be taken in lieu of an undertaking.³ Jurisdiction is not acquired by the appellate court unless a bond is filed,⁴ although the omission of the court to fix the bond, where the party has given notice and executed a bond, will not deprive a party of his right to appeal.⁵

To defeat an appeal on the ground that all the requirements of a bond have not been complied with, as that it has not been approved, requires clear proof.⁶ The appeal will not be dismissed because the amount is insufficient,⁷ as ample provision is made so that a defective bond may be amended,⁸ with the consent of the surety.⁹ The failure of the appellant to sign the bond may be immaterial where it is signed by sufficient sureties.¹⁰ If the judgment be a personal one for money, the bond must be double the amount of the judgment, including costs.¹¹ In other cases it must be fixed at such a sum as will be sufficient to cover the probable loss, damage or injury which the adverse party may sustain by the delay, and costs and damages awarded in the appellate court.¹² The bond must be payable to the adverse party, or otherwise as may be directed by the court, where conflicting interests require it, and subject to the condition that the appellant shall abide the judgment of the appellate court and pay all costs and damages awarded against him.¹³ The adverse party need not be specially named or referred to in the body of the undertaking.¹⁴ A condition may be good if it substantially com-

¹ *Bushong v. Graham*, 4 O. C. C. 188. *v. Jeffers*, 28 O. S. 90; *Johnson v.*

² *Hoagland v. Schnorr*, 17 O. S. 30. *Johnson*, 31 O. S. 181; O. Code, sec.

³ *Shamokin Bank v. Street*, 16 O. S. 1.

⁴ *Bradley v. Sneath*, 6 O. 491.

⁵ *Hubble v. Renick*, 1 O. S. 171. But see *Ralcliff v. Beck*, 10 W. L. J. 72; *Morgan v. Stittigan*, 10 W. L. J. 74.

⁶ *Robinson v. Chadwick*, 22 O. S. 527.

⁷ *Scott v. Hewett*, 7 O. C. C. 5; In *Witterfeldt's Appeal*, 29 W. L. B. 326; *Branch v. Dick*, 14 O. S. 551.

⁸ *Irwin v. Bank*, 6 O. S. 81; *Negley*

⁹ *Germania, etc. B. & L. Ass'n v. Kern*, 4 O. C. C. 35.

¹⁰ *Johnson v. Johnson*, 31 O. S. 181.

¹¹ O. Code, sec. 5230; *Bliss v. Long*, 5 O. 276, 337.

¹² O. Code, sec. 5230. As to sureties see 5 W. L. B. 711.

¹³ O. Code, sec. 5231. In the probate court, see *White v. Moerlidge*, 7 O. C. C. 348.

¹⁴ *Job v. Harlan*, 18 O. S. 436.

plies with the terms of the statute and covers all the stipulations which in any event may inure to the benefit of the appellee.¹ After notice of appeal has been given and a bond filed, the case is *eo instanti* in the appellate court, even though the clerk has failed to journalize the decree or notice the appeal.²

Sec. 1233. Appeal of separate interests.— Where the interest of a party desiring an appeal is separate and distinct from that of other parties, and he desires to appeal the part of the case in which he is interested, it will be so allowed, and the penalty and condition of the bond will be fixed accordingly.³ An appeal by one of two or more defendants from a judgment rendered jointly against them vacates the whole judgment, and transfers the entire case to the appellate court.⁴ But unless the interests of parties be separate and distinct from that of others, the appeal must be taken from the whole decree.⁵ A third person having the right so to do, who files a petition in a pending suit, which is dismissed on demurrer, may appeal at once without waiting for the final decree.⁶ And an appeal by one distributee in foreclosure carries up the whole case.⁷

Sec. 1234a. Staying execution.— The court may, on motion of the party entering notice of appeal, on such reasonable terms as may be necessary for the security of the adverse party, direct execution to be stayed for thirty days.⁸

Sec. 1234b. Suspension of judgment.— When an appeal is taken and bond given, the judgment is thereby suspended, unless some part of the final judgment appealed from be an injunction, in which case the injunction shall not be suspended except upon the order of the appellate court, upon reasonable notice to the adverse party.⁹ The lien of a judgment ap-

¹ Creighton v. Harden, 10 O. S. 579; Bentley v. Dorcas, 11 O. S. 398; Gardner v. Goodyear, 1 O. 170. See Myers v. Parker, 6 O. S. 501.

² State v. Meachem, 6 O. C. C. 31.
³ O. Code, sec. 5232; Bank v. Walters, 1 O. S. 204; Barr v. Chapman, 7 O. C. C. 363.

⁴ Ewers v. Rutledge, 4 O. S. 210.
Emerick v. Armstrong, 1 O. 516.

⁵ Wright v. W. U. Tel. Co., 4 O. C. C. 375; Brewster v. Anderson, 1 O. C. C. 479.

⁶ Thornton v. Railroad Co., 94 Ala. 353.

⁷ Moerlein Brewing Co. v. Westmeier, 4 O. C. C. 296.

⁸ O. Code, sec. 5234.

⁹ O. Code, sec. 5235.

pealed from is not thereby removed by the appeal.¹ The court may, upon reasonable notice, suspend an injunction until the case can be heard upon its merits.² The court of common pleas has no power over the judgment and cannot set it aside upon motion. It remains there, with no life in it except to retain any lien on the debtor's property which it may have.³

Sec. 1234c. Practice and pleading on appeal—Transcript to be filed.—When the proper bond has been filed with the court in which the judgment is rendered, to perfect the appeal a transcript of the proceedings in the lower court must be filed in the appellate court, together with all the original papers. If the appeal is from a magistrate's court, the transcript must be filed on or before the thirtieth day from the rendition of the judgment.⁴ If the appeal is taken from the common pleas to the circuit court, the transcript must be delivered on or before the first day of the term thereof next after the appeal is perfected.⁵ In an appeal from the probate court to the court of common pleas, the transcript must be filed on or before the second day of the term of said court next after an undertaking or notice is given;⁶ and in appropriation proceedings the transcript must be filed within thirty days after the date of the undertaking or the filing of the notice of the appeal.⁷ When these steps have been regularly taken the appeal is perfected.

Sec. 1234d. Pleading and practice—Appeals from justice.—In an action appealed from a justice of the peace, the parties proceed in all respects in the same manner as though the action had originally been instituted in the common pleas,⁸ and may be prosecuted as a civil action under the code.⁹ The same pleadings therefore must be filed as in an original case, although the parties may by agreement proceed to trial without pleadings, but upon the transcript.¹⁰ It is not essential that the petition in such cases state that the action comes into the court by appeal.¹¹ It matters not which

¹ O. Code, sec. 5236.

⁷ R. S., sec. 2257.

² McClung v. Coal & Coke Co., 7

⁸ R. S., sec. 6587.

O. C. C. 182.

⁹ Hill v. Supervisors, 10 O. S. 631;

³ Brewster v. Anderson, 1 O. C. C. 479-82.

Austin v. Hayden, 6 O. 388.

¹⁰ Hallam v. Jacks, 11 O. S. 692.

⁴ R. S., sec. 6585.

¹¹ McCullough v. Cramblett, 1 O.

⁵ O. Code, sec. 5235.

C. C. 830. If this should appear it should be from the facts alleged,

⁶ R. S., sec. 6409.

party prosecutes the appeal, the plaintiff in the case below must file the petition. The rule-day for filing a petition in the court of common pleas, in a case appealed from a justice of the peace, is the third Saturday after the expiration of the time limited for filing the transcript, and subsequent pleadings are filed within such times as is provided for the filing thereof in cases commenced in that court after the return-day of the summons.¹

If the plaintiff appeal and fail to file a petition, or otherwise neglect to prosecute the same to final judgment, judgment should be rendered against him.² And if the appellant fail to deliver a transcript and other papers within the proper time, the appellee may thereafter, at the term of said court next after the expiration of the time limited for filing the same, file a transcript of the proceedings and judgment of such justice, and the cause may thereupon, on motion of the appellee, be docketed; and the court may thereupon, on his application, enter a judgment in his favor similar to that entered by the justice.³ If the defendant appeal the case, and after having filed his transcript, and the plaintiff fail to file a petition, or otherwise fail to prosecute the same, the defendant may file his answer setting up whatever claim or demand he may have against such plaintiff, and prosecute the same to final judgment.⁴

Sec. 1234e. Pleading and practice—Appeals from probate court.—In taking an appeal from the probate court to the common pleas, the cause shall be tried, heard and decided in that court in the same manner as though it had original jurisdiction.⁵ Pleadings are not necessary in an appeal from the allowance of a claim of an executor against the estate, except that the court may order them to be filed.⁶ Nor are they necessary in an appeal from the county commissioners, as the case is heard upon the original papers without pleadings.⁷

showing the jurisdiction of the justice, execution of appeal bond, etc.
Id.

¹ R. S., sec. 6407.

² R. S., sec. 6101.

⁷ *Commissioners v. Robb*, 5 O. 490, *Commissioners v. Zeigelhofer*, 38 O. S. 523-525; *Stewart v. Logan Co.*, 2 O. C. C. 184, 185.

¹ R. S., secs. 6587, 6592, 6598.

² R. S., sec. 6590.

³ R. S., sec. 6588.

⁴ R. S., sec. 6592. See 1 Yapple's

Pldg., p. 724, for form of entry.

Sec. 1234f. Pleading and practice—Appeals from common pleas to circuit court—New pleadings—Parties—Amendments.—No additional or new pleadings are required in a case appealed from the court of common pleas to the circuit court, but the trial is there conducted in the same manner and upon the same pleadings as in the lower court.¹

The code, however, authorizes the circuit court to permit or order amendments to be made.²

Justice Swan, in *Grant v. Ludlow*,³ speaking of this matter, says: "But there is, undoubtedly, a limit to the power of the appellate court, in permitting pleadings to be altered and new parties to be made, arising out of the nature of original and appellate jurisdiction. An appellate court acts upon a suit already commenced and pending. It can not originate an action. And hence the amendment of pleadings, in the appellate court, can not be permitted, so as to substitute for the cause of action originally brought a new and different cause of action for the determination of the appellate court. But it not infrequently happens, especially in equity cases, that facts and allegations necessary to determine the subject-matter of the original cause of action have been omitted in the pleadings below, or the cause of action is imperfectly stated. Such amendments have been heretofore allowed on appeals in this state; and when the collateral facts, in equity suits, made it necessary to bring in a new party, it has been allowed. Such amendments are made for the purpose of settling and fully determining the cause of action appealed."

The same general rules governing amendments will apply equally to amendments in appellate procedure. An amended or supplemental pleading can not be permitted which substantially changes the nature of the action such as would raise an issue triable to a jury, which would have prevented an appeal.⁴ If new parties and interests arise, or are discovered after appeal, they may be brought in by amendment and their rights adjudicated as effectually as if they had been parties to the action in the lower court.⁵ Application to the appellate court for leave to amend is addressed to the sound discretion of the court as in

¹ R. S., sec. 5225; *McCulloch v. Cramblett*, 1 O. C. C. 330, 331; *Search v. Spence*, 7 O. C. C. 540; *Kilgore v. Emmitt*, 42 O. S. 410

² O. Code, sec. 5225.

³ 8 O. S. 1, 29, 32.

⁴ *Nelson v. Kennedy*, 4 O. C. C. 498; *Baldwin v. Rhea*, 33 Neb. 319.

⁵ *Morgan v. Spangler*, 20 O. S. 38; *Babcock v. Camp*, 12 O. S. 11, 33; *Grant v. Ludlow*, 8 O. S. 1; *Henry v. Jeans*, 47 O. S. 456; *Bausch v. McConnell*, 13 O. C. C. 640; *Mathers v. C. R. Tunnel Co.*, 5 Oh. Dec. 592.

other cases.¹ In an appeal from a magistrate's court the plaintiff can not be permitted to amend so as to change his cause of action to one not within the jurisdiction of the justice,² as by changing an account increasing the demand,³ although the parties may in such cases submit themselves to the jurisdiction of the court.⁴

Sec. 1234g. Same continued—Objections raised in appellate court.—As before stated, when the appeal is perfected every question between the parties is transferred to the appellate court, and it goes up as a whole,⁵ and yet there is a limitation in one respect. As a general rule, objections which were not made in the lower court can not be made on appeal.⁶ Thus, where the defendant has pleaded ownership of property which has been tried, objections to the description can not be made for the first time on appeal.⁷ But there are exceptions, as the questions of misjoinder of issues on demurrer,⁸ or a want of jurisdiction apparent on the face of the transcript,⁹ may be raised on appeal.

Sec. 1234h. The mandate.—The circuit court may either enforce a final order or judgment by process issued therefrom, or remand the same to the common pleas court for execution or other process. The clerk shall certify the same to the common pleas court, where it shall be entered upon the journal; and the judgment or order so entered, unless otherwise directed, shall, for the purpose of execution and other process, stand as the judgment of the common pleas court.¹⁰ The mandate can not be impeached in the lower court.¹¹

¹ Brock v. Bateman, 33 O. S. 609.

² VanDyke v. Rule, 49 O. S. 530.

³ Bickett v. Garner, 21 O. S. 659;
Woolever v. Stewart, 36 O. S. 146.

⁴ VanDyke v. Rule, *supra*, and cases cited.

⁵ Brewster v. Anderson, 1 O. C. C. 482. All questions are opened. Wanzer v. Self, 30 O. S. 378.

⁶ Missouri, etc., Co. v. Vandeventer, 26 Neb. 222; State v. Nelson, 101 Mo. 477; Fowler v. Bank, 113 N. Y.

450; O'Neill v. Railway Co. 115 N. Y. 579.

⁷ Hook v. Fenner, 32 Pac. Rep. 614 (Colo., 1893).

⁸ Wirth v. Bartell, 54 N. W. Rep. 399 (Wis., 1893).

⁹ Railroad Co. v. Parish, 33 N. E. Rep. 122 (Ind., 1893); Railroad Co. v. Creamer, 33 N. E. Rep. 238 (Ind., 1893); People v. Walter, 68 N. Y. 403.

¹⁰ O. Code, sec. 5239.

¹¹ Stevenson v. Morris, 37 O. S. 10.

CHAPTER 95.

PROCEEDINGS IN ERROR IN CIVIL CASES—EMBRACING THE PRACTICE IN ERROR IN THE SUPREME, CIRCUIT AND COMMON PLEAS COURT.

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| <p>Sec. 1235. Writ of error abolished.</p> <p>1236. Only final orders or those affecting substantial rights reviewable.</p> <p>1237. Exceptions must be taken to errors complained of.</p> <p>1238. Exceptions, how taken and shown—Bill of exceptions.</p> <p>1239. Bill of exceptions on motion of nonsuit.</p> <p>1240. Bill of exceptions—Error in charge of court.</p> <p>1241. Bill of exceptions—Verdict against law and evidence.</p> <p>1242. Bill of exceptions—Admission or rejection of evidence.</p> <p>1243. Bill of exceptions when there is a finding of facts.</p> <p>1244. Exhibits and papers as parts of bill of exceptions.</p> <p>1245. Allowance, signing and record of bill of exceptions.</p> <p>1246. Bill of exceptions taken to ruling of justice of the peace.</p> <p>1247. Bill of exceptions in court of common pleas (or circuit court).</p> <p>1248. Finding of facts and judgment—Formal parts.</p> <p>1249. Bill of exceptions by prosecuting attorney in criminal cases.</p> <p>1250. New trial defined and objects.</p> <p>1251. Motion for new trial, when necessary.</p> <p>1252. New trial for irregularity.</p> <p>1253. New trial for misconduct of jury or prevailing party.</p> | <p>Sec. 1254. New trial for accident or surprise.</p> <p>1255. New trial for excessive damages.</p> <p>1256. New trial for error in assessment of recovery.</p> <p>1257. New trial when verdict or judgment contrary to evidence and law.</p> <p>1258. New trial for newly-discovered evidence.</p> <p>1259. New trial for errors of law.</p> <p>1260. Form of motion for new trial.</p> <p>1261. Causes for which new trial not granted.</p> <p>1262. Application for new trial made by motion.</p> <p>1263. Motion should be made when.</p> <p>1264. Application for new trial after term.</p> <p>1265. Limitation in error proceedings.</p> <p>1265a. Same—Commencement of proceeding in error.</p> <p>1265b. Same—Parties can not confer jurisdiction.</p> <p>1265c. Same—Trial had under belief that proceeding was properly commenced.</p> <p>1265d. Same—Filing petition in error.</p> <p>1265e. Same—When statute begins to run.</p> <p>1265f. Same—Persons under disability—Against whom it runs.</p> <p>1265g. Same—Miscellaneous.</p> <p>1266. Error in common pleas court—Jurisdiction.</p> <p>1267. Error in the circuit court—Jurisdiction.</p> <p>1268. Error in the supreme court—Jurisdiction.</p> |
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Sec. 1269. Parties in error.

- 1270. The petition in error.
- 1271. Motion for leave to file petition in error.
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- 1291. Judgment rendered on error.
- 1292. Journal entry reversing judgment of justice.
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- 1294. Journal entry of reversal in circuit court.
- 1295. Speedy justice.

Sec. 1235. Writ of error abolished.—When the code was adopted in Ohio the old writs of error and *certiorari*, the method pursued at common law to reverse, vacate or modify judgments or final orders in civil cases, were abolished,¹ and were superseded by the petition in error.² At the same time provisions were enacted providing for a bill of review, so that any final decree, or order then existing, might be reversed without interference with existing rights. But the code should no longer be incumbered therewith.³

Sec. 1236. Only final orders or those affecting substantial rights reviewable.—Only final orders or those affecting substantial rights are subject to review upon error. The code defines a final order to be “an order affecting a substantial right in an action, when such order in effect determines the

¹ O. Code, sec. 6781.

Collier, 6 O. S. 55; Hobbs v. Beckwith, 6 O. S. 252.

² Butler v. Baker, 2 O. S. 326; In re

³ O. Code, secs. 6785–40.

action and prevents a judgment; and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed."¹

A substantial right involves the idea of a legal right, one which is protected by law.*

Error lying only from final judgments, decrees or orders,² the determination of what constitutes a final order oftentimes presents nice questions. A decree or judgment which disposes of the whole merits, either of the whole case or some branch of it, putting an end thereto, is final.³ But an order or judgment which leaves a material question for further action or determination is an interlocutory one.⁴ In determining what is a final order, the substance and effect must be considered and not its legal or equitable nature.⁵

Following are illustrations of final orders or judgments reviewable on error: An allowance of temporary alimony;⁶ or a modification of a final order as to the custody of children;⁷ or an order discharging an attachment,⁸ or overruling a motion to discharge,⁹ or setting aside a judgment by default;¹⁰ or the dismissal of an answer and cross-petition of a creditor in foreclosure proceedings,¹¹ or of an appeal in the circuit court;¹² or a decree made upon a report of a master;¹³ or a judgment of a justice of the peace in an action of forcible entry and detainer,¹⁴ although the refusal of the court of common pleas to entertain a petition in error in such proceedings is not reviewable.¹⁵ A judgment refusing¹⁶ or allowing a motion for a new trial is final if the case is finally disposed of at the time, and reviewable on error;¹⁷ and so with an order striking a case from the docket for want of

¹ R. S., sec. 6707.

² *Kinsley v. State*, 8 O. S. 508; *Reed v. Reed*, 17 O. S. 568; *Holbrook v. Connelly*, 6 O. S. 199; *Watson v. Sullivan*, 5 O. S. 42.

³ *Kelly v. Stanbery*, 18 O. 421; *Clarke v. Bentel*, 11 W. L. B. 105.

⁴ *Teaff v. Hewitt*, 1 O. S. 511; *Kelly v. Stanbery*, *supra*; *Evans v. Dunn*, 26 O. S. 444; *Fliedner v. Rockefeller*, 12 W. L. B. 20-23.

⁵ *Railroad Co. v. Sloan*, 31 O. S. 1.

⁶ *King v. King*, 38 O. S. 370.

⁷ *Neil v. Neil*, 38 O. S. 558.

⁸ *Armstrong v. Brewing Co.*, 53 O. S. 467.

⁹ *Watson v. Sullivan*, 5 O. S. 42.

¹⁰ *Young v. Gerdes*, 42 O. S. 102.

¹¹ *Johnson v. Taylor*, 2 Handy, 178.
¹² *Carpenter v. Canal Co.*, 35 O. S. 307.

¹³ *Spence v. Basey*, 34 O. S. 42.

¹⁴ *Evans v. Dunn*, 26 O. S. 439. *Cf.* *Harmon v. Walter*, 2 Clev. Rep. 165.

¹⁵ *Kelly v. Nichols*, 10 O. S. 318.

¹⁶ *Rothmell v. Winterstein*, 42 O. S. 249; *Carroll v. O'Conner*, 25 O. S. 617.

¹⁷ *Hammond v. Same*, 21 O. S. 620.

¹⁸ *Ohio v. Kelly*, 25 O. S. 22.

service,¹ or an order reversing a judgment and remanding a cause for further proceedings, which may be reviewed while the cause is still pending in the lower court.² But it has been held under a peculiar wording of an entry, that a judgment reversing the common pleas court with costs, and remanding a cause to such court for execution, is not a final judgment, but leaves the case pending in the intermediate reviewing court.³ Where in an action against a corporation a stockholder is given leave to file an answer after judgment, an order of an appellate court striking out the answer because filed at that time is reviewable.⁴

An order made by the court of common pleas overruling a motion to dissolve an injunction is one affecting a substantial right made in a special proceeding.⁵ An order for the removal of a cause to a federal court is a final one;⁶ and so with an order appointing or removing a receiver.⁷ It is well understood that an order calling for the exercise of discretion can not be reviewed unless there has been a clear abuse.⁸ An order dismissing an action for want of security for costs⁹ or without prejudice¹⁰ is not a final reviewable one. Nor is an order to pay costs upon the return of a verdict,¹¹ or one made by a judge at chambers, dissolving a temporary injunction,¹² or a reference to a master,¹³ nor an order striking out part of a pleading,¹⁴ or the overruling of a demurrer with leave to answer,¹⁵ or overruling a motion to set aside a verdict and for a new trial before final disposition of the case final.¹⁶ Error proceedings can not be prosecuted to reverse the judgment of the probate court in admitting a will,¹⁷ or a spoliated will to probate.¹⁸

It may not be good practice for a court to act upon an affi-

¹ *Evans v. Iles*, 7 O. S. 233.

² *Schaeffer v. Marienthal*, 17 O. S. 183.

³ *Bolles v. Stockman*, 42 O. S. 445.

⁴ *Henry v. Jeans*, 48 O. S. 443.

⁵ *Burke v. Railway Co.*, 45 O. S. 631.

⁶ *Insurance Co. v. Dunn*, 20 O. S. 175.

⁷ *Railroad Co. v. Sloan*, 31 O. S. 1; *Railway Co. v. Duckworth*, 2 O. C. C. 518.

⁸ *Legg v. Drake*, 1 O. S. 286; *Longstreth v. Halsey*, 4 O. C. C. 307 (enforcement of interrogatories). It is discretionary whether the court will require proof in an action on an account when the defendant is in default, hence such a judgment is not reviewable. *Dallas v. Ferneau*, 25 O. S. 635; *Harris v. Ray*, 15 B. Mon. 628.

⁹ *Stamburgh v. Doran*, 2 W. L. M. 600.

¹⁰ *Ferrall v. Blufton Lodge*, 31 O. S. 463.

¹¹ *Warren v. McKenzie*, 23 O. S. 628.

¹² *Cincinnati College v. Cincinnati*, 1 C. S. C. R. 255; *Atwood v. Whipple*, 48 O. S. 308.

¹³ *Longworth v. Mullaly*, 2 Handy 131.

¹⁴ *Holbrook v. Connelly*, 6 O. S. 199.

¹⁵ *Krause v. Stichtenoth*, 15 C. C. 199; *Hart v. Murray*, 3 O. C. C. 431.

¹⁶ *Conrad v. Runnels*, 23 O. S. 601; *Collins v. Mansfield*, 13 O. C. C. 259; *Young v. Shellenberger*, 53 O. S. 291, 301.

¹⁷ *Mosier v. Harmon*, 29 O. S. 220.

¹⁸ *Holbrah v. Lasance*, 16 O. C. C. 187.

davit for an attachment which only substantially complies with the statute, yet it is not reversible error.¹ Nor can an order of the trial court reversing the probate court in appropriation proceedings, retaining the case for trial and final judgment, be reviewed.² If it appears that the rights of the parties in error have really been settled, leaving nothing but abstract questions to be examined, the reviewing court will not consider them, but will affirm the judgment.³

Sec. 1237. Exceptions must be taken to errors complained of.—That error will not be presumed is a familiar and well-settled general rule;⁴ and an erroneous ruling can only be reviewed by a court of error when the same has been duly excepted to at the time the decision or ruling is made.⁵ An exception is defined as an exception taken to a decision of a court upon a matter of law.⁶ Exceptions may by leave of court be withdrawn by the person taking or filing the same, at any time before the proceedings in error are commenced and before the exceptions are recorded.⁷ An exception may be shown in certain cases by causing it to be noted at the end of the entry, and in others by a bill of exceptions taken at the trial term, which must show that it was taken at the proper time.⁸ Time may be given to reduce an exception to writing, not more than fifty days beyond the term at which the verdict of a jury is rendered or the cause is decided when tried to the court.⁹

No particular form of exception is required, but it should be stated with the facts, or so much of the evidence as is necessary to explain it, and no more, and as briefly as possible.¹⁰ Even though some of the formalities may be wanting, if the court finds the bill of exceptions sufficient in substance, it will consider its contents.¹¹ The exception, however, must be spe-

¹ *Harrison v. King*, 9 O. S. 388.

Humbers, 2 O. C. C. 51-3; *Railroad*

² *Railway Co. v. Bailey*, 39 O. S. 170.

Co. v. Washburn, 22 O. S. 554.

³ *Toledo v. Rhodes*, 81 W. L. B. 32 (Supreme Ct.).

⁶ O. Code, sec. 5297.

⁷ O. Code, sec. 5304.

⁴ *McHugh v. State*, 43 O. S. 154; *Kent v. State*, 42 O. S. 480.

⁸ *Geauga Iron Co. v. Street*, 19 O. S. 800; *Stegeman v. Humbers*, *supra*; *Dayton v. Hinsey*, 32 O. S. 258.

⁵ O. Code, sec. 5298; *Railroad Co. v. Washburn*, 22 O. S. 554; *Templeton v. Kraner*, 24 O. S. 223; *Franks v. State*, 12 O. S. 1; *Stegeman v.*

⁹ O. Code, sec. 5298; *Whittaker's Ohio Civ. Code* (4th Rev. ed.), p. 284.

¹⁰ O. Code, sec. 5299.

¹¹ *Wilson v. Giddings*, 23 O. S. 561.

cific and not general;¹ and if to a ruling on the admission of testimony, it will be waived unless a motion is made to exclude the incompetent testimony.² As immaterial and non-prejudicial errors, or those not affecting substantial rights, are disregarded,³ it is therefore incumbent upon the party seeking a reversal of a judgment to show not only that error has intervened, but that it has been prejudicial.⁴ Slight mistakes or omissions in pleadings may be cured by judgment, but not totally defective ones.⁵ The refusal to sustain a motion to separately state and number several causes of action is not prejudicial error;⁶ and failure to aver the performance of a condition precedent is immaterial if no prejudice results therefrom;⁷ and so with an erroneous instruction to a jury,⁸ or the rejection of incompetent testimony which could not have changed the verdict.⁹

The provisions of the code relating to the taking of exceptions have no application to final judgments or orders, as it is not essential that an exception be taken to a final judgment before it can be reversed or modified.¹⁰ It has also been held that the term "exception" does not apply to a decision upon demurrer, and that a decision overruling a demurrer may be reviewed without a formal exception taken thereto.¹¹ A judgment will not be reversed for error in sustaining a demurrer to an answer where the defendant files an amended answer.¹²

Sec. 1238. Exceptions, how taken and shown — Bill of exceptions.— An exception to a decision which is entered on the record, the grounds of objection appearing in the entry, may be taken by the party causing it to be noted at the end of the entry that he excepts.¹³ A case may be submitted by

¹ *Elstner v. Fife*, 82 O. S. 358.

² *Jennings v. Haynes*, 1 O. C. C. 22, 845.

³ O. Code, sec. 5115.

⁴ *McHugh v. State*, 43 O. S. 154; *Kent v. State*, 43 O. S. 480. Materiality of evidence must affirmatively appear. *Courtright v. Staggers*, 15 O. S. 511; *Gondolfo v. State*, 11 O. S. 114.

⁵ *Gittings v. Baker*, 2 O. S. 21.

⁶ *Bear v. Knowles*, 36 O. S. 43.

⁷ *Dayton Ins. Co. v. Kelly*, 24 O. S.

⁸ *Berry v. State*, 31 O. S. 219.

⁹ *Thayer v. Luce*, 23 O. S. 62, 63.

¹⁰ *Bank v. Buckingham*, 12 O. S. 402; *Justice v. Lowe*, 26 O. S. 372.

¹¹ *Ruffner v. Board*, 1 Disney, 196. See *Lindeman v. Ziegler*, 12 W. L. B. 319; *Davis v. Hines*, 6 O. S. 473.

¹² *Kitchen v. Loudonback*, 48 O. S. 177; *Krause v. Stichtenoth*, 8 O. C. D. 291.

¹³ O. Code, sec. 5300.

parties upon an agreed statement of facts such as is authorized by the code, which may be the subject of an action, and upon which a judgment may be rendered;¹ in which case the submission, and the judgment thereon, constitute the record;² and a motion for a new trial, or a bill of exceptions, is unnecessary in order to obtain a review of the same upon error.³ But when the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, or the exception is to the decision of the court on a motion to direct a nonsuit, or to arrest the testimony from the jury, or for a new trial for misdirection by the court to the jury, or because the verdict, or, if a jury is waived, the finding of the court, is against the law and the evidence, or on the admission or rejection of evidence, the party excepting must reduce his exceptions to writing and present the same to the trial judge or judges for allowance not more than fifty days beyond the date of the overruling of the motion for a new trial, or from the adjournment of the term at which decision was rendered by the court when a motion for a new trial is not necessary.⁴

It will thus be seen that under this provision a bill of exceptions may be taken at a term subsequent to the trial term.⁵ The party objecting to a decision must except at the time it is made, but may have time to reduce it to writing, or prepare his bill of exceptions, within fifty days after the overruling of the motion for new trial,⁶ or from the adjournment of the term at which the decision of the court was rendered, when a motion for a new trial is not necessary.⁷ The formal statement of the exceptions constitutes a bill of exceptions, and is the only means of bringing such errors before a reviewing court, as exceptions to the charge of the

¹ O. Code, sec. 5207; Newark, etc. R. R. Co. v. Commissioners, 30 O. S. 120.

² O. Code, sec. 5208.

³ Brown v. Mott, 22 O. S. 149-50.

⁴ O. Code, sec. 5301; as amended 91 O. L. 141; Whittaker's O. Civ. Code (4th Revised), p. 235.

⁵ In case the judge be absent from the district or circuit when the bill is prepared, the same may be deposited within fifty days with the clerk for examination and allowance by the judge or judges, who shall be

required to sign the same if correct on or before the fifth day of the term next ensuing after the expiration of the fifty days; 91 O. L. 141. It is held in Indiana that a motion for a new trial which is continued to another term carries the whole case, and a bill of exceptions may be taken at such subsequent term. Bennett v. May, 34 N. E. Rep. 327 (Ind., 1893). See Coleman v. Edwards, 5 O. S. 51.

⁶ Cincinnati St. Ry. Co. v. Wright, 54 O. S. 181; Weaver v. Ry. Co., 55 O. S. 491.

⁷ Whittaker's O. Civ. Code, p. 234, sec. 5298; 93 O. L. 299.

court or other questions cannot be saved by merely making them part of the journal entry.¹

Bills of exceptions are construed most strongly against the party complaining;² but an objection cannot be made thereto in the court of last resort which was not made in the intermediate court.³ The party complaining prepares the bill and presents it to opposing counsel, then to the court. Counsel usually agree upon the matters contained, and when they have consented to an entry showing that a bill was duly perfected they are estopped from claiming otherwise.⁴ If the trial judge or judges be absent from the district or circuit when the bill is prepared for allowance, then the same may be deposited within fifty days with the clerk of the court for examination and allowance by the trial judge or judges, who are required to sign and seal the same before the fifth day of the next ensuing term after the expiration of the fifty days.⁵ A bill of exceptions may be corrected at any time during the trial term,⁶ or it may be amended by a *nunc pro tunc* order after the trial term⁷ and after it has been signed.⁸ A judgment of the probate court may be reviewed on written examinations which are made part of a transcript or record, without any bill of exceptions.⁹ And in all cases before a justice of the peace, whether tried to a jury or the justice, either party has the right to take a bill of exceptions to the rulings of the justice, which shall be signed by the justice and made a part of the record.¹⁰

The whole purpose or object of such bills of exceptions is to review questions of law, and they are unauthorized for any other purpose,¹¹ so that a question as to the weight of the evidence in *any* case cannot be reviewed by the court of com-

¹ Lockhart v. Brown, 31 O. S. 481; 729 (Mo., 1893); Harris v. Tomlinson, Fleischman v. Shoemaker, 2 O. C. C. 130 Ind. 426.

155.

⁵ State v. Joseph, 12 So. Rep. 934;

² Hollister v. Reznor, 9 O. S. 9.

45 La. Ann. —.

³ Cooch v. Irwin, 7 O. S. 22.

⁹ Howell v. Fry, 19 O. S. 556.

⁴ Potter v. Meyers, 81 O. S. 103.

⁶ O. Code, sec. 5301; 91 O. L. 141; Miller v. Cincinnati, 47 O. S. 110. See

¹⁰ R. S., sec. 6565. A bill of exceptions may also be taken in forcible entry and detention. R. S., sec. 6610.

State ex rel. v. O'Neal, 3 O. C. C. 393.

⁸ Ash v. Marlow, 20 O. 119.

¹¹ Baer v. Otto, 34 O. S. 15; Leonard v. Cincinnati, 26 O. S. 447.

⁷ Burdoin v. Trenton, 22 S. W. Rep.

mon pleas,¹ although the question as to whether there was *any* evidence may be reviewed.² It has been frequently held that a bill of evidence is not a bill of exceptions;³ therefore, where the record shows that no bill of exceptions was perfected and filed as required by law, the judgment of the trial court should be affirmed.⁴ Errors of law occurring at the trial term of a superior court cannot be reviewed by a bill of exceptions taken at the general term; a review can only be had when a bill has been properly perfected at the trial term.⁵ A bill of exceptions is not intended to draw the whole controversy into examination, but only such points as to which the attention of the reviewing court is directed by an exception duly taken and properly assigned for error.⁶

The rules of court for the preparation of bills of exceptions are stringent. They must be printed or legibly written upon but one side of the paper, the pages must be numbered, marginal references must be made to the important parts relied upon, with a full index. If these requirements are not complied with, the court may strike the bill from the files;⁷ or it may refuse to consider exceptions to the admission of testimony unless marginal references are made.⁸ A judge has no power or authority to allow or sign a bill of exceptions upon a hearing or order made by him at chambers.⁹

Sec. 1239. Bill of exceptions on motion for nonsuit.—When an exception is made to a ruling upon a motion to direct a nonsuit,¹⁰ all the evidence relating thereto must be set out.¹¹ And if it tends to prove the facts in issue, the party complaining has the right to have its weight and sufficiency passed upon by the jury; it is therefore erroneous, under such circumstances, to sustain the motion.¹² And where there is some evidence tending to support the allegations of the petition,

¹ *Yager v. Greiss*, 1 O. C. C. 581.

² *Kaufman v. Broughton*, 81 O. S. 424; *Clark v. Stitt*, 1 Toledo Legal News, 184, 185.

³ *Cook Carriage Co. v. Johnson*, 28 W. L. B. 874 (Supreme Court, unreported).

⁴ *Hart v. Hughes*, 28 W. L. B. 874.

⁵ *Cook Carriage Co. v. Johnson*, 28 W. L. B. 874.

⁶ *House v. Elliott*, 6 O. S. 497.

⁷ Rules of Practice, Whittaker's O. Code, xxix.

⁸ *Lima Electric Light, etc. Co. v. Deubler*, 7 O. C. C. 185.

⁹ *Ohio Circuit Court*, Scribner, J., in 1 Toledo Legal News, 478, title of case not given.

¹⁰ O. Code, sec. 5801.

¹¹ *Wagers v. Dickey*, 17 O. 489.

¹² *Stockstill v. Railroad Co.*, 24 O. S. 83.

however slight, it is error for the court to direct the verdict, as the plaintiff has the right to the opinion of the jury upon it. A reviewing court will therefore, where all the evidence is taken up by bill of exceptions, examine into the question as to whether there was *any* evidence tending to support the plaintiff's allegations, and will reverse the trial court if it so finds.¹ A motion to dismiss an action cannot be reviewed unless there is a bill of exceptions setting forth the facts upon which the court acted.²

Sec. 1240. Bill of exceptions — Error in charge of court.

An exception to a charge of the court is reviewable only when made part of and duly authenticated by a bill of exceptions.³ It cannot be done by merely making the charge and exception a part of the journal entry.⁴ But it has been held to be necessary to incorporate into the bill of exceptions only the parts complained of,⁵ though it is customary and the best course to include the whole charge, as it may be necessary for the reviewing court to look to it as a whole. In fact we should say that it is necessary, in disregard of the ruling just referred to, to incorporate the whole charge in the bill of exceptions, in view of the fact that it is the duty of the reviewing court to look at the whole charge. In no other way can it be determined whether there was error. And where single propositions only are included which are claimed to be erroneous, and others are referred to but are not found in the record, it will be presumed, in support of the judgment, that the charge as a whole was correct.⁶

In taking exceptions, the Ohio practice has, until a recent radical change, been that the particular parts objected to should be pointed out,⁷ which had to be done immediately after the charge was delivered to the jury. This was the universal practice; yet, in exceptional cases, it was departed from. It was said that special exceptions were not necessary in all cases before a reviewing court would look into a charge and reverse a judg-

¹Clark v. Stitt, 1 Toledo Legal News, 184.

²Railway Co. v. Construction Co., 49 O. S. 681-3.

³Pettett v. Van Fleet, 81 O. S. 586; Goodin v. State, 16 O. S. 344; O. Code, sec. 5801.

⁴Lockhart v. Brown, 31 O. S. 481.

⁵Banta v. Martin, 38 O. S. 584.

⁶Bean v. Green, 33 O. S. 444.

⁷Adams v. State, 25 O. S. 584;

Railroad Co. v. Strader, 29 O. S. 448;

Railway Co. v. Probst, 30 O. S. 104;

Powers v. Railway Co., 33 O. S. 480-

88; Everett v. Sumner, 33 O. S. 562;

Railway Co. v. Porter, 33 O. S. 328.

ment; as, for example, where the overruling of a motion for a new trial was assigned for error and the evidence and charge were properly before the court by bill of exceptions, the charge was considered in connection with the evidence, even though not excepted to, and if erroneous, the judgment was reversed.¹ Thus it is shown that there have been conflicting decisions upon this question. There must have been some special reasons which induced the court to depart from the rule so well established, that "a general exception to the whole charge, without specifying particular portions, presents no question for review on error."² A general exception to the refusal to give a series of charges as requested when one or more is unsound, was not entertained.³

An amendment to the code now provides that a general exception taken to any charge of any court applies to all errors of law which may exist in each charge that are material and prejudicial to the substantial rights of the party excepting.⁴ The mere failure to instruct upon particular propositions, unless requests were made, is not error.⁵ Where requests are refused they should be set forth in the bill of exceptions before error can be claimed thereon.

By a recent amendment to the statute it is provided that either party may, when the evidence is concluded, present written instructions to the court on matters of law, and request that the same be given or refused by the court before the argument to the jury is commenced.⁶ The refusal to do this is prejudicial error unless the court otherwise directs. It may be to the decided advantage of a party to have a charge given before the argument proceeds.⁷

Sec. 1241. Bill of exceptions—Verdict against law and evidence.—The evidence will not be reviewed upon error unless there has been a motion for a new trial on the ground that the verdict was against the weight of the evidence.⁸ A full statement of all the testimony relating to every point made in the argument of a motion for a new trial must be made in the bill of exceptions,⁹ in fact it must affirmatively ap-

¹ Baker v. Pendergast, 32 O.S. 494; Weybright v. Fleming, 40 O. S. 52.

² Railway Co. v. Erick, 51 O. S. 146; 31 W. L. B. 260.

³ Railway Co. v. Probst, 30 O. S. 104.

⁴ R. S. 5298, amended 93 O. L. 299.

⁵ Jones v. State, 20 O. 34.

⁶ R. S., sec. 5190; amended 89 O. L. 59, 60; Whittaker's Ohio Civil Code (4th Rev. ed.), p. 183.

⁷ Root v. Village of Monroeville, 1 Toledo Legal News, 208 (Bentley, J., 1894); Village of Monroeville v. Root, 54 O. S. 523.

⁸ O. Code, sec. 5301; Whittaker's Ohio Civ. Code (4th Rev. ed.), 235; Kepner v. Snively, 19 O. 296; Westfall v. Dungan, 14 O. S. 276; Ide v. Churchill, 14 O. S. 372.

⁹ Tracy v. Card, 2 O. S. 432.

pear that the bill of exceptions contains all the evidence given in the case.¹ Even though it be stated that the bill contains all the evidence, and material documents are in fact omitted, the judgment will not be reversed on the ground that the verdict is against the evidence.² A statement that testimony was introduced tending to prove certain things is not sufficient to advise a reviewing court whether or not the verdict was against the weight of evidence;³ a judgment will not therefore be reversed where the evidence set forth only tends to prove a fact, and there is no showing that there was not other evidence tending to disprove it.⁴ The question of what consideration is given the evidence by a reviewing court is discussed elsewhere.⁵

Sec. 1242. Bill of exceptions — Admission or rejection of evidence.— It has been said that the exclusion of evidence is generally an evil, and its admission safe and wise.⁶ In harmony with this idea, it has been held that where testimony has been improperly rejected it will be presumed that the party offering the same was prejudiced thereby, though the facts which would have been shown by the testimony do not appear.⁷ But this view is not by any means consistent with other principles found in the decisions and the code. The burden is upon the party complaining to show that he has been prejudiced by an erroneous ruling, as only prejudicial errors will be noticed.⁸ A judgment will not be reversed merely because of the admission of incompetent testimony where there was competent evidence sufficient to sustain the finding.⁹ Such ground can only be available when it appears that upon the competent evidence the verdict or finding ought to have been different.¹⁰ If the evidence is not set out in the bill of exceptions, it will be presumed that there was evidence con-

¹ Hall v. Reed, 17 O. 498; Youmans v. Caldwell, 4 O. S. 71; Coil v. Willis, 18 O. 28; Tilton v. Morgaridge, 12 O. S. 102; Hoffmire v. Cunard, 11 W. L. B. 136; Railroad Co. v. Probst, 80 O. S. 104. A bill showing that it contains only the substance of a deposition is not sufficient. 80 O. S. 104.

² Armleder v. Lieberman, 88 O. S.

³ Walker v. Devlin, 2 O. S. 593.

⁴ Farmers' College v. Butler, 18 O. S. 418.

⁵ See sec. 1287, *post*.

⁶ Bell v. Brewster, 44 O. S. 690.

⁷ Wolf v. Powner, 80 O. S. 472.

⁸ O. Code, sec. 5803.

⁹ Black v. Hill, 82 O. S. 312.

¹⁰ Cook v. Slate Co., 36 O. S. 135.

sistent with the pleadings such as would justify the verdict or judgment.¹ It is therefore not only necessary that the objections to the admission or rejection of testimony be made at the time,² but the testimony must appear in the bill of exceptions, as there can be no presumptions whatever;³ otherwise rejected testimony cannot be considered upon error.⁴

In the case of excluded evidence the bill should show what it was intended to prove, and that it was material or prejudicial to the plaintiff in error.⁵ Error in excluding proper evidence is not cured by the fact that there was other and stronger evidence tending to establish the same fact as that embraced in the bill.⁶ A reviewing court cannot determine whether error has been committed in the admission of testimony unless the bill of exceptions shows all the evidence.⁷ Where improper material evidence has been allowed to go to a jury under objections, the presumption is that it was prejudicial, and hence it is unnecessary to show that the jury was in fact influenced by it.⁸

Sec. 1243. Bill of exceptions when there is a finding of facts.—In certain cases arising on contract, the right of trial by jury may be waived, as well as in other actions, with the assent of the court, and by consent of the party appearing when the other party fails to appear, or by written or oral consent.⁹ In the trial of questions of fact by the court, the parties may request the court to make a special finding in

¹ *Kitchen v. Loudenback*, 48 O. S. 177.

² *Gage v. Payne*, W 678; *Perkins v. Dibble*, 10 O. 484; *White v. Richmond*, 16 O. 5. As to admission before the question is answered, *Union Rolling Mill v. Packard*, 1 O. C. C. 77.

³ *McHugh v. State*, 42 O. S. 154; *Palmer v. Yarrington*, 1 O. S. 253.

⁴ *Palmer v. Yarrington*, *supra*.

⁵ *Neff v. Cincinnati*, 32 O. S. 215; *Gondolfo v. State*, 11 O. S. 114; *Bean v. Green*, 32 O. S. 444; *Oviatt v. State*, 19 O. S. 573. It must affirmatively appear that it was prejudicial. *Hollister v. Reznor*, 9 O. S. 9; *Scovern v. State*, 6 O. S. 294; *Hummel v. State*, 17 O. S. 628. The testimony so offered

need not be set out—only the facts it tended to prove. *Himrod Furnace v. Railroad Co.*, 22 O. S. 451. A statement that there was evidence tending to prove certain facts is not sufficient. *U. S. Express Co. v. Bachman*, 2 C. S. C. R. 251. See cases in *Cunningham's Ohio Dec. on Ev.*, pp. 238–251.

⁶ *Railway Co. v. Herrick*, 49 O. S. 28.

⁷ *Baldwin v. Bank*, 1 O. S. 142. For cases on error in admission of evidence see *Cunningham's Ohio Dec. on Ev.*, pp. 222–237; *Clark v. Stitt*, 1 *Toledo Legal News*, 184, 185.

⁸ *Board v. Mills*, 38 O. S. 333.

⁹ O. Code, sec. 5204.

writing, stating the conclusions of fact separately from the conclusions of law. This is done with a view of excepting to the decision upon the questions of law involved.¹ Error may be prosecuted to the ruling of the court in such cases as though trial were had to a jury,² and the questions of law arising upon the facts found, without request, may be reviewed without a bill of exceptions or a motion for a new trial.³ But a review cannot be had in such a case where the question raised is that the finding of fact is not sustained by the evidence, without a motion for a new trial or to set the finding aside;⁴ and a bill of exceptions must then be taken showing all the evidence acted upon by the trial court,⁵ as questions of the sufficiency of the evidence in such cases can only be raised by a bill of exceptions.⁶ While the reviewing court will not ordinarily look beyond the errors assigned, except as to jurisdictional matters,⁷ yet having found the error complained of to exist, the court may look into the whole record to ascertain whether it was prejudicial.⁸

The circuit court may look beyond the facts found, and ascertain from the evidence such other material facts as are supported, and make such disposition of the case as is warranted by the whole record.⁹ A finding of facts made by the circuit court from the evidence contained in a bill of exceptions in a case before it on error is not authorized, and, if made, will present no question reviewable by the supreme court.¹⁰ There is a presumption that no evidence was offered from which any other facts could be found than those set forth in the finding. Consequently, if the record does not contain the evidence and the finding is within the issue, the presumption on error is conclusive.¹¹ If it admits of two constructions, one in favor of affirmance and the other of reversal, the finding should receive that construction which will

¹ O. Code, sec. 5205.

² *Bank v. Buckingham*, 12 O. 483;

Bissell v. Couchaine, 15 O. 58.

³ *Lockwood v. Krum*, 34 O. S. 1;

Harner v. Batdorf, 35 O. S. 113.

⁴ *Ide v. Churchill*, 14 O. S. 372-77;

Everett v. Sumner, 32 O. S. 562.

⁵ *Ide v. Churchill*, *supra*.

⁶ *Ralston v. Kohl*, 30 O. S. 92;

Shinkle v. Bank, 22 O. S. 516.

⁷ *Levi v. Daniels*, 22 O. S. 88.

⁸ *Oliver v. Moore*, 23 O. S. 473.

⁹ *Sturgeon v. Hall*, 8 O. C. C. 269.

¹⁰ *Young v. Pennsylvania Co.*, 23 W. L. B. 299.

¹¹ *Springer v. Avondale*, 35 O. S. 624.

sustain the judgment.¹ An agreed statement of facts ordinarily forms no part of the record unless made so by a bill of exceptions;² but when carried into the record, and the trial court finds it to be all the testimony and that no further testimony was offered, it has been held unnecessary to re-embody the same into a bill of exceptions.³ The finding of the court cannot be reviewed on error where a motion for a new trial was made only upon the ground that it was against the weight of evidence.⁴ But when the court states its conclusions of law and fact separately, the questions of law may be reviewed in the absence of a motion for new trial.⁵

Sec. 1244. Exhibits and papers as parts of bill of exceptions.—It is necessary that all exhibits or papers be set out or attached to a bill of exceptions, or in some way connected therewith, so as to make them part thereof.⁶ Affidavits introduced and used on the hearing of a motion cannot be used unless made part of the record by a bill of exceptions.⁷ Nor can affidavits, or the certificate of a clerk, or an agreed statement of counsel as to what took place at the trial, be made to supply the place of a bill of exceptions.⁸ Where papers are used without objection in the circuit court, no objection can be raised in the court of last resort.⁹ An omission in this respect may be supplied by a journal entry directing a paper to be taken as part of the bill.¹⁰ If reference is made to exhibits sufficiently to identify them, they will be considered as part of the bill.¹¹ A reviewing court may treat as part of a bill a deposition claimed to be the identical deposition given in evidence, where it is attached to the bill only by being placed between the pasteboard back and the stenographer's report, and not marked as an exhibit.¹²

Sec. 1245. Allowance, signing and record of bill of exceptions.—If the exception be true, or if it be not true, then, after it is corrected, the trial judge, or a majority of the judges composing the trial court, must allow and sign it before the

¹ Jack v. Hudnall, 25 O. S. 255; Springer v. Avondale, 35 O. S. 623.

² Bank v. Bank, 16 O. 170; Acheson v. Sutliff, 18 O. 122.

³ McGonnigle v. Arthur, 27 O. S. 252.

⁴ Westfall v. Dungan, 14 O. S. 276; McHenry v. Carson, 41 O. S. 224.

⁵ Lockwood v. Krum, 34 O. S. 1; McHenry v. Carson, 41 O. S. 224.

⁶ Wells v. Martin, 1 O. S. 386; Busby v. Finn, 1 O. S. 409; Kerr v. Burns, 12 W. L. B. 68.

⁷ Garner v. White, 23 O. S. 192.

They can not be copied into the record without a bill. Sleete v. Williams, 21 O. S. 82; Schultz v. State, 32 O. S. 276.

⁸ Young v. State, 23 O. S. 578.

⁹ Cooch v. Irwin, 7 O. S. 22.

¹⁰ Busby v. Finn, 1 O. S. 49.

¹¹ Baker v. Scovill, 2 C. S. C. R. 37.

¹² L. E. & W. R. R. Co. v. Mackay, 53 O. S. 370.

case proceeds; or if the party excepting consents, within fifty days after the overruling of the motion for a new trial, or from the adjournment of the term at which the decision of the court when a motion for a new trial is not necessary; or in the absence of the trial judge or judges from the district or circuit, on or before the fifth day of the next ensuing term of court.¹ This then constitutes the bill of exceptions.² The trial judge is not bound to sign a bill of exceptions unless it be a true one; he is the sole judge of its correctness, and can not be compelled to sign it where he denies that the one presented is a true bill.³ He may amend the bill to conform to the facts,⁴ but no changes can be made by a reviewing court.⁵ The signing may be suspended until the close of the trial, when the party is entitled to have it allowed and signed within the time prescribed.⁶ It need not be signed at the trial term, as formerly, but within fifty days after the entry of the judgment as provided by statute, and if the motion for new trial is continued to the next term by consent and without judgment having been entered on the verdict, the party does not lose his right to have it allowed, but it may be allowed within fifty days after the overruling of the motion for a new trial.⁷ In cases where a motion for new trial is necessary, the complainant includes all his grounds of error therein, and the error is then regarded as arising out of the action of the court in overruling the motion for new trial, and the time within which a bill of exceptions may be taken, setting forth the action of the court, is computed from the date when the motion for a new trial is overruled.⁸ A bill of exceptions signed by one of three judges can not be regarded as part of the record, even though the journal entry recites that it has been made part thereof;⁹ but if signed by two judges it will be sufficient.¹⁰ It is not essential in all cases that it be signed by the same judges who presided at the trial, unless they also presided at the time the motion for new trial was heard and disposed of.¹¹

If the bill of exceptions is not filed within the proper time it can not be considered part of the record. The statements in the bill of exceptions must control as to the date of the execu-

¹ R. S., sec. 5298, Am. 93 O. L. 299; ⁷ O. Code, secs. 5301, 5302; Whittaker's Ohio Civ. Code (4th Rev. ed.) pp. 235, 239.

Rev. ed.), p. 239.

² See *ante*, sec. 1238.

³ *State ex rel. v. Todd*, 4 O. 351; *Creager v. Meeker*, 22 O. S. 207. See *ante*, sec. 795.

⁴ *Hyde v. Boyle*, 89 Cal. 590; 28 Pac. Rep. 1092.

⁵ *Smith v. Board*, 27 O. S. 44.

⁶ *State ex rel. v. Hawes*, 43 O. S. 16.

⁸ *Cincinnati St. Ry. Co. v. Wright*, 54 O. S. 181; *Weaver v. Ry. Co.*, 55 O. S. 491.

⁹ *Wagner v. Ziegler*, 44 O. S. 59; *Shillito v. Thacker*, 43 O. S. 63; *Ran-kin v. Sanderson*, 35 O. S. 482.

¹⁰ *Bascom v. Parish*, 18 O. 266.

¹¹ *Wilson v. Giddings*, 28 O. S. 561.

tion, rather than those in the journal entry of allowance, especially if it proves the journal entry to be untrue.¹ And if it appear that the bill is erroneous in that it does not contain all the evidence, the reviewing court cannot require it to be corrected when the time prescribed by statute for its allowance and execution has elapsed. The trial court can neither correct the old bill nor sign a new one.² It must be filed with the pleadings; and if the party filing the same so request, it must be made part of the record, but not spread upon the journal; and an entry of the allowance and signing thereof must be entered upon the journal of the court within the time fixed for such allowance.³ Where an entry of allowance has been omitted, it may be supplied by a *nunc pro tunc* order made at a subsequent term.⁴ If not allowed and signed during the progress of the trial, the party excepting must submit the bill to the opposite counsel for examination not less than ten days before the expiration of the fifty days in which it is to be filed, and, unless the trial judge or judges be absent from the district or circuit, the same shall be submitted to him or them for signature not less than five days before the expiration of the fifty days. But the trial judge or judges may extend the time for signing the bill for a period not exceeding ten days beyond the expiration of the fifty days, which shall be indorsed on the bill by the court.⁵

The trial judge may refuse to sign the bill if the same has not been duly presented to opposite counsel, unless consented to by them. The provision for extension of time is for the convenience of the court, to enable the judge to examine and allow the bill, and not to enable the party excepting to present it to opposite counsel.⁶ Hence it follows that a bill of

¹ Bowen v. Gazlay, 8 O. C. C. 256 (1894); Busby v. Finn, 1 O. S. 409.

² Haberty v. State, 8 O. C. C. 263 (1894); Busby v. Finn, 1 O. S. 409.

³ O. Code, sec. 5302; 89 O. L. 125; Whittaker's Ohio Civ. Code (4th Rev. ed.), p. 239; Burk v. Railway Co., 26 O. S. 648; Kerr v. State, 36 O. S. 614; Heffner v. Moyst, 40 O. S. 112. It must appear that it was tendered in due time and must be reasonably identified. Hill v. Bassett, 27 O. S. 597. The entry must show that it was allowed as well as signed. Railroad Co. v. Kirchner, 6 O. C. C. 211.

⁴ Bothe v. Railroad Co., 37 O. S. 147; Mitchell v. Thompson, 40 O. S. 110.

⁵ O. Code, sec. 5302; 89 O. L. 125.

⁶ Pugh v. State, 31 W. L. B. 195; 51 O. S. —.

exceptions presented to the judge for signing on the forty-second day after the overruling of the motion for a new trial is not within the time, unless opposing counsel consent to taking part of the last ten days of the fifty days for the examination.¹ It is not necessary to give notice of the extension of time for the signing of the bill of exceptions.² If the bill is not presented to opposite counsel at least ten days before the expiration of the fifty days, and to the judge or judges at least five days before the expiration of such period, the judge or judges have lost jurisdiction over the matter and are without authority to sign the bill of exceptions, or to extend the time for that purpose.³

Sec. 1246. Bill of exceptions taken to ruling of justice of the peace.—

BILL OF EXCEPTIONS.

P. W. }
v. } Before C. H. B., Justice of the Peace in and for the
J. S. } Township of C., — County, Ohio.

Be it remembered that on the — day of —, 18—, the plaintiff filed his affidavit for attachment in the above-entitled action, a copy of which affidavit is hereto attached marked "A," and made a part hereof. And that on the — day of —, 18—, the defendant filed his motion to dismiss said attachment with an affidavit thereto annexed, a copy of which is hereto attached marked "B," and made a part hereof; and that afterwards, on the — day of —, 18—, the motion to dismiss said attachment came up for hearing before said justice of the peace, and the said plaintiff to maintain the issue on his part offered the evidence of T. R. W., J. C. D., the defendant J. S. and that of himself, as follows: [*Give testimony.*]

¹ *Gibb v. Townsend*, 1 Toledo Legal News, 355 (Huron county circuit court, Scribner, J., 1894). Yet the court adopting the doctrine just given, stated that the ruling made by the supreme court in *Pugh v. State*, 81 W. L. B. 195; 51 O. S. —, required it to regard such a bill as not having been filed in time, but notwithstanding that fact examined into the case and affirmed the judgment. *Gibb v. Townsend*, *supra*. The supreme court holds it to be the duty of the trial judge to refuse to allow and sign a bill when not presented in time; but in *Gibb v. Townsend*, 1 Toledo Legal News, 355, in which the foregoing doctrine was announced, the trial judge did not deem it his duty to refuse to sign the bill, nor did the circuit court deem it its duty to follow what it considered a strict regard for the decision of the supreme court required of it. It may be supposed from the expression "unless the opposite counsel consent to the using the last ten days for the examination of the bill" that the bill under consideration in *Gibb v. Townsend*, *supra*, had not yet been presented to counsel.

² *McDonald v. McAllister*, 32 Neb. 514; 49 N. W. Rep. 377.

³ *Neuman v. Becker*, 54 O. S. 323; *Upham Mfg. Co. v. Warrington*, 8 Oh. Dec. 371.

The defendant thereupon introduced the following testimony: [*give testimony*], and the plaintiff offered the following evidence in rebuttal: [*Copy of evidence.*]

Foregoing testimony in rebuttal objected to; objection overruled; defendant excepted; — which was *all the evidence* offered by either party in said case. Whereupon said justice of the peace overruled said motion to discharge and dismiss, and held said attachment to be well taken out and in full force and virtue, to which opinion and ruling of said justice upon said motion to discharge said attachment, and to his holding said attachment to be good, said defendant then and there excepted and prays said justice to sign and seal this his bill of exceptions, which is accordingly done, on this — day of —, 18—.

C. H. B., J. P. [*Seal.*]

Sec. 1247. Bill of exceptions in court of common pleas (or circuit court).—

Franklin County, Ohio, Court of Common Pleas [*or, Circuit Court.*]

J. F., Plaintiff, }
vs. } Bill of Exceptions.
R. H.

Be it remembered that at the trial of this cause at the —, 18—, term of said court, before the Hon. — —, judge [*or, judges*] of said court of —, the plaintiff, to maintain the issues on his part to be maintained, offered as witnesses the following persons, who testified as follows: [*Plaintiff's testimony, with exceptions noted.*]

Thereupon the plaintiff rested.

And the defendant, to maintain the issues on his part, offered as witnesses the following persons, who testified as follows: [*Defendant's testimony.*]

The foregoing is all the testimony offered by either party.

And thereupon defendants rested. And thereupon plaintiff [*or, defendant*] made the following requests to charge, which were refused: [*State them.*] Thereupon the court charged the jury as follows: [*Copy entire charge.*]

The jury thereupon retired for deliberation, and, after due consideration, returned the following verdict: [*Copy verdict.*]

Whereupon the court gave judgment for the plaintiff, as appears of record in the cause; and thereupon the defendant filed a motion to set aside said judgment and for a new trial: which, upon consideration, the court overruled, as also appears of record; and the defendant thereupon excepted to the overruling of said motion, and presented this his bill of exceptions, first to opposing counsel on the — day of —, 18—, and to the court on the — day of —, 18—, and prayed that the same be allowed, signed, sealed and made a part of the

record, which is accordingly done this — day of —, 18—,
and at the — term of said court.

— —,
— —,
— —,

Judge[s] of said Court.

Sec. 1248. Finding of facts and judgment — Formal parts.

[*Caption.*]

This day this cause came on to be heard on the petition of the plaintiff, the answer of the defendant, and the reply of the plaintiff thereto, and on the testimony of witnesses, and was argued by counsel.

And thereupon the court being asked to separately state its findings of facts and its conclusions of law in this case, the court thereupon finds from the testimony as the facts in this case, the following: [*Statement of facts.*]

The court finds as conclusions of law that [*statement of conclusions of law.*]

It is therefore considered and adjudged by the court that said defendant go hence without day and recover of the plaintiff his costs herein expended, to which conclusions of law, upon said findings of facts, the plaintiff by his counsel at the time excepted.

Sec. 1249. Bill of exceptions by prosecuting attorney in criminal cases.—

BILL OF EXCEPTIONS.

Court of Common Pleas, — County, Ohio.

The State of Ohio }

vs.

A. S. }

Indictment for —

Be it remembered that on the — day of —, 18—, being one of the days of the January term in said year of the court of common pleas of — county and state of Ohio, and being the day on which this cause was set for trial before Hon. — —, judge of said court, presiding, a jury was impaneled and sworn to try the issue in said case; and on said trial, to maintain the issue upon the part of the state of Ohio, the prosecuting attorney called a number of witnesses, to wit, in number twenty-two, who were each duly sworn and examined before said court and jury. [*Copy evidence.*]

And the defendant, to maintain the issue on his part, called as witnesses the following [*names of witnesses*], whose testimony is as follows: [*Copy evidence.*]

And thereupon the plaintiff, further to maintain the issues on its part, called a number of witnesses, who were duly sworn and examined in rebuttal, and thereupon the state rested.

The foregoing is all the evidence offered by either side.

And the court and jury having heard all the evidence given or offered by either side upon the trial of the case, and at the close of the testimony and before the argument of the respective counsel the prosecuting attorney asked the court to give the following charges to the jury, each of which the court refused to give, and to each of which refusals the prosecuting attorney then and there excepted, to wit: [*Copy of charges refused.*]

And the court then charged the jury upon said point and subject as follows, to wit, after having first explained to the jury the different grades of criminal homicide and the character and amount of proof required to establish either and each of such grades, as well as the offense of assault and battery, etc.: [*Copy of charge given.*]

To the giving of which charge the prosecuting attorney for the state of Ohio objected, but the court overruled said objection and gave said charge to the jury, to which giving of said charge and overruling of said objection the prosecuting attorney at the time excepted.

And this was all the instructions and charges that the court gave to the jury upon the subject asked by the prosecuting attorney, and the subject embraced in the charge of the court aforesaid.

Whereupon the jury retired for deliberation and returned a verdict against the defendant in the words and figures following, to wit: [*Copy of verdict.*]

A true copy of the indictment in said cause is hereto attached, marked "Exhibit A," and is made a part hereof, and is in the words and figures following, to wit: [*Copy of indictment.*]

And now the prosecuting attorney presents this his bill of the several exceptions by him taken in the manner and at the times above set forth, and prays that the same be allowed, signed, sealed and made part of the record, which is accordingly done this — day of —, 18—.

[*Seal.*] D. W. C.,
Judge of the Court of Common Pleas of
— County, Ohio.

NOTE.—A copy of the journal entries should accompany the bill.

Sec. 1250. New trial defined, and objects.—A new trial is a re-examination, in the same court, of an issue of fact, after a verdict by a jury, a report of a referee or master, or a decision of a court; and the former verdict, report or decision will be vacated, and a new trial granted, on the application of the party aggrieved.¹ The purpose of the new trial is the correction of any errors or other prejudicial matters

¹ O. Code, sec. 5305.

occurring during the trial.¹ The complaining party must exhaust his remedy in the trial court by filing his motion before he can ask a reviewing court to consider the errors of which he complains. The court of last resort will not review alleged errors by petition in error until a ruling has been obtained upon the motion² and an exception taken thereto.³ A new trial should not be granted upon mere technical grounds where substantial justice has been done.⁴ The motion is addressed to the sound discretion of the court; and where a new trial is allowed, the judgment so rendered cannot be reversed for error in such allowance.⁵ The causes for which new trials may be granted are shown in the succeeding sections.

Sec. 1251. Motion for new trial, when necessary.—A motion for a new trial is necessary where it is sought to correct errors which are not apparent on the face of the record.⁶ It is an essential prerequisite to the prosecution of proceedings in error, as it serves the purpose of arraigning the errors committed during the progress of a trial, with the assistance of a bill of exceptions, bringing them upon the record.⁷ These errors are such as the code provides may be excepted to,⁸ as misdirection of the court,⁹ or that the verdict of the jury or finding of the court is against the law and the evidence,¹⁰ or in the admission or rejection of testimony.¹¹ It has been held in Ohio, however, that when the error complained of is in the admission or rejection of evidence a motion for new trial is unnecessary.¹² These errors are considered by the authorities to have been waived in the absence of a motion for new trial.¹³ It follows, therefore, that where the facts appear of record,¹⁴ and

¹ *Seifrath v. State*, 35 Ark. 412.

² *Jones v. Hayes*, 36 Neb. 526;
Smith v. Spaulding, 34 Neb. 128;
Brown v. Coal Co., 48 O. S. 542; 34
O. S. 128.

³ *Foster v. Robinson*, 6 O. S. 94.

⁴ *Buck v. Waddle*, 1 O. 357; *Bush v. Critchfield*, 5 O. 109.

⁵ *Conard v. Runnels*, 23 O. S. 601;
Smith v. Board, 27 O. S. 44; *Jaspers v. Mallon*, 11 W. L. B. 166.

⁶ *Brown v. Mott*, 22 O. S. 149;
Racer v. Baker, 113 Ind. 177; *Harrington v. Latta*, 23 Neb. 84; 36 N. W. Rep. 364.

⁷ *Brown v. Mott*, *supra*; *Randall v. Turner*, 17 O. S. 262; *Werner v. State*, 44 Ark. 127; *McAllister v. Insurance Co.*, 78 Ky. 531.

⁸ O. Code, sec. 5301, as amended 89 O. L. 124-5.

⁹ *Id.*; *Young v. King*, 33 Ark. 745; *Higgins v. Lee*, 16 Ill. 495.

¹⁰ O. Code sec. 5301, as amended 89 O. L. 124-5; *Volmer v. Stagerman*, 25 Minn. 234; *Randall v. Turner*, 17 O. S. 262; *Westfall v. Dungan*, 14 O. S. 276; *Randall v. Turner*, 17 O. S. 262.

¹¹ O. Code, sec. 5301; *Fowler v. Young*, 19 Kan. 150; *Racer v. Baker*, 113 Ind. 177.

¹² *Earp v. R. R. Co.*, 12 O. S. 621.

¹³ *Thompson on Trials*, sec 2712, and cases.

¹⁴ *Bateson v. Clark*, 37 Mo. 31; *McIntire v. McIntire*, 80 Mo. 470.

the questions are confined to such as are apparent, or to the pleadings, a motion is unnecessary. Illustrative of this rule may be stated the case of trial to the court, where special findings of facts and law are made separately, where the parties complain only of the law as applied to the facts, making no question of the sufficiency of the latter.¹

The view is taken by some courts that such a case may be reviewed on error involving a consideration of the sufficiency of the evidence, upon the theory that there is no reason for requiring a court to pass upon them a second time.² But this doctrine is not followed in Ohio. The trial court must be given an opportunity to re-examine upon a motion for a new trial when the complaint is upon the ground that the finding is not supported by the evidence.³ In fact, the reviewing court will look beyond the finding made.⁴ So where an agreed case has been submitted to the court, a motion for a new trial is unnecessary;⁵ or where a court refuses to vacate an order appointing a receiver;⁶ or where there is an error in the pleading;⁷ or where the judgment is rendered upon demurrer.⁸

Sec. 1252. New trial for irregularity.—A new trial may be granted for irregularity in the proceedings of the court, jury, referee, master or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial.⁹ The irregularity or misconduct must have affected the judgment or improperly influenced the verdict;¹⁰ as where a judgment is taken upon a warrant of attorney without filing the original warrant with the petition.¹¹ The fact that a paper improperly went to the jury, in the absence of fraudulent intent, is immaterial;¹² and

¹ Spangler v. Brown, 26 O. S. 389. S. E. Rep. 451; O'Conner v. Koch, 56 Mo. 253. See Thompson on Trials, sec. 2715.

² Thompson on Trials, sec. 2718.

⁹ O. Code, sec. 5305.

³ Ide v. Churchill, 14 O. S. 372-77; ¹⁰ Armleder v. Lieberman, 33 O. S. Everett v. Sumner, 33 O. S. 562. See 77. *ante*, sec. 1257.

¹¹ Bank v. Doty, 9 O. S. 505.

⁴ See *ante*, sec. 1243.

⁵ Brown v. Mott, 22 O. S. 149.

¹² Tracy v. Card, 2 O. S. 431; Neff v. Cincinnati, 32 O. S. 215. It must have been sent in through some trick. Maynard v. Fellows, 43 N. H. 259. See Hilliard's N. T., p. 217, sec. 23.

⁶ Mercantile Trust Co. v. Iron Works, 4 O. C. C. 580.

⁷ State v. Phares, 24 W. Va. 657-
v. 2.

⁸ Rogers v. Rogers, 78 Ga. 688; 3

so where the judge sends to them a copy of the statutes, in the absence of the parties, calling their attention to certain sections relating to the case.¹ Nor is it reversible error to permit papers not in the case to be taken by the jury, where it does not prejudice any one;² and so with irregularities in the selection,³ or impaneling,⁴ or swearing⁵ of a jury.

Sec. 1253. New trial for misconduct of jury or prevailing party.—Any misconduct of the jury or prevailing party which affects the substantial rights of the unsuccessful party is the second ground for a new trial.⁶ For example, the separation of a juror after a case has been submitted, for the purpose of drinking,⁷ or conversation with others, after their retirement, in regard to the case,⁸ will, unless satisfactorily explained, be ground for new trial. The presence of an officer in the jury room is not necessarily a cause for new trial, depending upon circumstances.⁹ Jurors must not make disclosures of any personal knowledge they may have, contradicting persons who testified in the jury room, as it will be misconduct warranting the setting aside of the verdict.¹⁰ A new trial has been granted where the officers in charge of the jury talked of the case in such a way as to influence them.¹¹ It is misconduct warranting a new trial for a defendant to talk to a jury about the case while viewing the premises, and treating them to beer and cigars after they have made the view.¹² It is said that the intercourse between judge and jury is in many respects very confidential, and that many things may pass between them which will not amount to misconduct, as answering questions, or delivering papers to them accidentally withheld.

¹ *Gondolfo v. State*, 11 O. S. 114.

² *Jaspers v. Mallon*, 11 W. L. B.

166.

³ *Page v. Danvers*, 7 Met. 326.

⁴ *Ferris v. People*, 35 N. Y. 125.

⁵ *State v. Jones*, 5 Ala. 666.

⁶ O. Code, sec. 5805.

⁷ *Weis v. State*, 22 O. S. 486; *Wright v. Burchfeld*, 8 O. 58. See *Hilliard's New Trials*, p. 199, secs. 2a, 3, 4, etc. It is immaterial if a juror drank during progress of trial if this did not influence the result. *Railroad Co. v.*

Porter, 22 O. S. 323. See *State v. Boley*, 17 Ia. 89.

⁸ *Farrer v. State*, 2 O. S. 54. See *Sutliff v. Gilbert*, 8 O. 405; 11 W. L. B. 278; *Knight v. Freeport*, 13 Mass. 218.

⁹ See article in 11 W. L. B. 278, and cases cited; *Hilliard on New Trials*, sec. 25, p. 169.

¹⁰ *Kent v. State*, 42 O. S. 426. See *Lawrence v. Collier*, 1 Cal. 37.

¹¹ *Nelms v. State*, 18 S. & M. 500.

¹² *Bender v. Buehrer*, 1 Toledo Legal News, 91 (Lucas Co. C. C., 1894).

Counsel for either party should not be permitted to read and comment upon matter not in evidence or relevant to the issues, if prejudicial, as it will furnish a ground for a new trial;¹ and so with evidence taken at a former trial.² Any attempt on the part of the prevailing party or his attorney to corrupt a juror, even though unsuccessful, is good ground for a new trial.³ And so with his refusal to testify on cross-examination,⁴ though not where the defeated party was not prejudiced.⁵ It is said that "It is singular, indeed, that almost the only evidence of which the case admits should be shut out;"⁶ but the rule adopted by the weight of authority is that the affidavits of the jurors themselves cannot be used to impeach their verdict,⁷ as that they did not understand the charge.⁸ While the weight of authority seems in favor of the rule of exclusion, there may arise cases where justice will require an exception to be made.⁹ Affidavits are admissible to show that the verdict as received and entered, by reason of a mistake in drawing it, or of a mistake made in open court when it is received, does not embody the true findings of the jury.¹⁰

Sec. 1254. New trial for accident or surprise.— Accident or surprise, which ordinary prudence could not have guarded against, is a third cause for a new trial.¹¹ Motions founded upon this ground are addressed to the sound discretion of the court;¹² and, as has been frequently asserted, a judgment will

¹ *Insurance Co. v. Cheever*, 36 O. S. 201. As to reading from scientific works see *Cory v. Silcox*, 6 Ind. 39. It is held largely discretionary with the court. *Legg v. Drake*, 1 O. S. 286.

² *Martin v. Orndorff*, 23 Ia. 504.

³ *Railroad v. Porter*, 32 O. S. 328.

⁴ *Foreman v. Railroad Co.*, 4 W. L. M. 159.

⁵ *Burdick v. Railroad Co.*, 54 N. W. Rep. 489 (Ia., 1892).

⁶ *Hilliard's N. T.*, p. 248, citing *Owen v. Warburton*, 1 N. R. 326.

⁷ *Farrar v. State*, 2 O. S. 54; *Sargent v. State*, 11 O. 472; *Hulet v. Barnet*, 10 O. 459; *Wertz v. C., H. &*

D. R. R. Co., 1 Toledo Legal News, 484 (Butler Co. C. P., Van Pelt, J.)

⁸ *Holman v. Riddle*, 8 O. S. 384. *Contra*, *Packard v. United States*, 1 Ia. 225.

⁹ *Hilliard, N. T.*, p. 247, sec. 67.

¹⁰ *Wertz v. C., H. & D. R. R. Co.*, 1 Toledo Legal News, 484 (Butler Co., O., Com. Pl. 1894, Van Pelt, J.); *Jackson v. Dickinson*, 15 Johns. 309; 2 Am. Dec. 236; *Little v. Larrabee*, 2 Greenleaf, 37; 11 Am. Dec. 43; *Prussell v. Knowles*, 4 How. (Miss.) 90.

¹¹ O. Code, sec. 5305.

¹² *Isham v. Fox*, 7 O. S. 320; *Coleman v. State*, 20 Ark. 53; *Todd v. State*, 25 Ind. 212.

not be reversed unless there has been a clear abuse of discretion.¹ To warrant the granting of a new trial upon this ground, it is incumbent on the applicant to show accident or surprise in reference to a material matter, which could not be avoided by ordinary prudence, and that it actually produced an injury.² It cannot be granted for error or neglect of counsel,³ or because, by being misled by a misapprehension of the law, he abstained from offering pertinent testimony.⁴ Failure to receive notice of trial is not such an accident as will warrant the granting of a new trial, where it was occasioned by the party's own neglect.⁵ But where parties have negotiations for settlement pending, and a cause is set down without their knowledge, and judgment rendered thereon, it will be set aside.⁶ And so will a motion for a new trial be granted on the ground of fraud.⁷ Cases may arise where a party is surprised, as where a witness duly summoned absents himself,⁸ or where counsel are led to believe that a certain witness of his adversary is not to be present. But the fact that the unsuccessful party was surprised at the testimony of his adversary's witness is not ground for new trial,⁹ and so where a witness testifies to facts not testified to on a former trial, where substantial justice is done.¹⁰ It is essential that the party surprised make the necessary objection at the time, as it may be that the matter can be remedied during the trial, or that the trial may be continued.¹¹ The motion upon this ground must clearly assign the nature of the accident or surprise, and be accompanied by affidavits showing the merits.

Sec. 1255. New trial for excessive damages.—A new trial should be granted where excessive damages, appearing to have been given under the influence of passion or prejudice, have

¹ *Nooney v. Mahoney*, 30 Cal. 226.

⁵ *Griffin v. O'Neil*, 47 Kan. 116; 27 Pac. Rep. 826.

² *Chicago & G. E. Ry. Co. v. Voe-*
burgh, 45 Ill. 311; *How v. Bodman*,
1 Dian. 115; *Endress v. Nelp*, 1 Dian.
411.

⁶ *Mitchell v. Knight*, 7 O. C. C. 204.

⁷ *Hayward v. Calhoun*, 2 O. S. 164;

Fackler v. Relief Society, 5 W. L. B.
853.

³ *How v. Bodman*, *supra*; *Endress*
v. Nelp, *supra*; *Barrow v. Jones*, 1 J.
J. Marsh. 470; *Dame v. Dame*, 38
N. H. 429, 484; *Handy v. Davis*, 38
N. H. 411.

⁸ *Pilot, etc. Co. v. Chapman*, 11 Cal.
161.

⁹ *Bingham v. Walk*, 128 Ind. 164.

¹⁰ *Stites v. McKibben*, 2 O. S. 588.

⁴ *Ferguson v. Gilbert*, 16 O. S. 88.

¹¹ *Wait v. Maxwell*, 5 Pick. 217;
Jackson v. Davis, 5 Cow. 123.

been awarded.¹ The amount must be so large as to evince prejudice, partiality or corruption.² While courts move with great caution in setting aside verdicts, especially on account of excessive damages, yet where they are obviously exorbitant there should be no hesitation;³ and where in such cases a new trial has been refused, the judgment will be reversed unless a *remittitur* be entered for the excess.⁴ The court may in fact make *remittitur* of the excess the condition of refusing a new trial, which will not be held to be error.⁵

Sec. 1256. New trial for error in assessment of recovery.—A new trial will be granted where there has been “error in the assessment of the amount of recovery, whether too large or too small, when the action is upon contract, or for the injury or detention of property.”⁶ Where judgment has been rendered for a larger sum than was due, the error may be corrected by remitting the excess, even after the petition in error has been filed.⁷

Sec. 1257. New trial when verdict or judgment contrary to evidence and law.—A new trial may be had where the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law.⁸ The same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case.* This is one of the grounds most commonly adopted, and embraces the verdict of the jury, report of the master or referee, and the decision of the court without the intervention of a jury. And yet there is danger of conflict between court and jury; and unless courts rigidly refrain from interfering with the verdict unless manifestly against the evidence,⁹ they will usurp the functions of the latter. Courts should therefore rarely undertake to decide upon the weight or effect of evidence, and should do so only where the verdict is clearly wrong, and not when there is a mere difference of opinion.¹⁰ A new trial should be granted

¹ O. Code, sec. 5305.

² *Simpson v. Pitman*, 18 O. 365; *Fisher v. Patterson*, 14 O. 418.

³ *Railway Co. v. Slusser*, 19 O. S. 157.

⁴ *Lear v. McMillan*, 17 O. S. 464.

⁵ *Pendleton St. R. Co. v. Rahmann*, 22 O. S. 446; *Douglas v. Day*, 28 O. S. 175; *Durrell v. Carver*, 9 O. S. 72; *Durrell v. Boyd*, 2 *Disney*, 463; *Ryan v. Sayen*, 1 *Toledo Legal News*, 264.

A verdict for personal injuries should not be set aside unless the jury abused its discretion. *Schneider v. Hosier*, 21 O. S. 93.

⁶ O. Code, sec. 5305.

⁷ *Doty v. Regour*, 9 O. S. 526.

⁸ O. Code, sec. 5305.

⁹ *Breese v. State*, 12 O. S. 146.

¹⁰ *McGatrick v. Wason*, 4 O. S. 505; *Remington v. Harrington*, 8 O. 507;

* R. S., sec. 5306, amended 93 O. L. 217.

where it is clear that material uncontradicted evidence has been disregarded which would have required a different verdict. A decision or finding of the court is entitled to the same consideration as a verdict, and will not be set aside unless clearly erroneous.¹ Neither finding of court or jury can be reviewed on error upon the ground that it is against the evidence, unless there has been a motion for a new trial which has been overruled and an exception taken.² A judgment of an intermediate reviewing court, reversing the trial court in overruling a motion for a new trial and remanding the cause, will not be disturbed where it appears that the evidence was conflicting as to a material point in issue.³

Sec. 1258. New trial for newly-discovered evidence.—Newly-discovered evidence, material to the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, is ground for a new trial.⁴ It is said that motions of this character should be scrutinized very closely. After the trial of a case it is a very easy matter to discover new evidence and to see what ought to have been. The evidence should be of the most satisfactory character.⁵ Motions upon this ground therefore rest in the discretion of the court, and cannot be reviewed unless there has been an abuse of discretion.⁶ And yet the code affords ample opportunity to the complainant, by extending the time within which a motion may be made upon this ground.⁷ But the mover must have been vigilant in discovering evidence before the trial ceases, as the law does not encourage the granting of new trials except for substantial reasons.⁸ There are certain well-defined rules governing motions made under this head. The newly-discovered evidence must, when considered with

French v. Millard, 2 O. S. 53; Abernethy v. Bank, 5 O. S. 266.

¹ Merrick v. Boury, 4 O. S. 60; Insurance Co. v. Bollmeyer, 5 O. S. 107.

² Westfall v. Dungan, 14 O. S. 276; Ide v. Churchill, 14 O. S. 373; Turner v. Turner, 17 O. S. 449; Randall v. Turner, 17 O. S. 263; Kepner v. Snively, 19 O. 296.

³ Woolen Mills Co. v. Titus, 35 O. S. 252.

⁴ O. Code, sec. 5303.

⁵ Callahan v. Caffarata, 39 Mo. 136; People v. Sackett, 14 Mich. 320.

⁶ Smith v. Bailey, 26 O. S. 1.

⁷ O. Code, sec. 5397. See sec. 1263, *post*.

⁸ Fitzgerald v. Brandt, 36 Neb. 683; Searles v. State, 6 O. C. C. 332; Sutherland v. State, 108 Ind. 389.

that produced, require a different verdict or finding.¹ The motion will not be granted where the newly-discovered evidence is merely cumulative,² and will ordinarily be refused where the evidence merely impeaches the credit or character of a witness,³ though in exceptional cases, where it is of such a controlling character as to require a different verdict, it has been admitted.⁴ The motion should be accompanied with an affidavit that he could not discover the evidence by the exercise of due diligence, giving the names of the witnesses, and the newly-discovered facts.⁵ When a review of the action of the trial court in overruling the motion is sought, the bill of exceptions should contain the newly-discovered testimony so far as it may have been before the lower court.

Sec. 1259. New trial for errors of law.—A new trial may be granted for any error of law occurring at the trial and excepted to by the party making the application.⁶ The matters embraced under this provision are decisions or rulings made in the progress of the trial in the admission or exclusion of evidence, and in charging the jury, probably sufficiently discussed elsewhere.⁷ A judgment will not be reversed because of the admission of improper evidence, unless it has caused substantial prejudice,⁸ though a new trial should be granted where it has been clearly prejudicial.⁹ The same rule is applicable to the rejection of testimony. The rejection of cumulative evidence may be immaterial;¹⁰ but the non-admission of competent evidence will be sufficient to warrant a new

¹ *Railroad Co. v. Long*, 24 O. S. 133; 3 Ind. App. 39; *Stockes v. Monroe*, Fleet v. Hollenkam, 18 B. Mon. 219; 86 Cal. 383.
² *Ludlow v. Park*, 4 O. 7.

³ *Reed v. McGreen*, 5 O. 375; *Perlin v. Insurance Co.*, 11 O. 147; *Howe v. Bodman*, 1 Disn. 115; *Hurd v. French*, 1 C. S. C. R. 365; *Hill v. Helman*, 33 Neb. 735; *Stevens v. Hey*, 15 O. S. 813; *Jackson v. Swope*, 33 N. E. Rep. 909 (Ind., 1893). See *Hilliard's N. T.*, p. 499, sec. 13.

⁴ *Jackson v. Swope*, 33 N. E. Rep. 909 (Ind., 1893); *Christ v. People*, 8 Colo. 394; *Fist v. Fist*, 32 Pac. Rep. 719 (Colo., 1893); *Keith v. Knoche*, 43 Ill. App. 161; *Green v. Beckner*,

⁴ *Bailey v. State*, 36 Neb. 808; *Parker v. Hardy*, 24 Pick. 124; *Greenleaf v. Grounder*, 84 Me. 50-1; *Tappin v. Clark*, 32 Conn. 367; *Boggs v. Lynch*, 22 Miss. 563.

⁵ *Moore v. Coates*, 35 O. S. 183; *Leonard v. Schuler*, 34 Miss. 475; *Hughes v. People*, 116 Ill. 330. See *Thompson on Trials*, sec. 2762.

⁶ O. Code, sec. 5305.

⁷ See *ante*, sec. 1242.

⁸ *Whitman v. Keith*, 18 O. S. 184.

⁹ *Bank v. Carson*, 30 Neb. 104; *Doe v. Pendleton*, 15 O. 735.

¹⁰ *Allen v. Parrish*, 3 O. 107.

trial where it would have changed the verdict.¹ It is not necessarily error for the court to comment on the evidence,² though if the English rule were followed it might be beneficial rather than prejudicial. A verdict will not be disturbed because of the fact that the court charged propositions not involved in the case, if not prejudicial,³ or for an omission to charge upon any question arising unless requested so to do.⁴ But where it appears from the whole record that the charge, though correct, might have been misunderstood by the jury, a new trial should be granted.⁵

Sec. 1260. Form of motion for new trial.—

Now comes the defendant [*or*, plaintiff] and moves the court to set aside and vacate the verdict of the jury, and for a new trial, for the following errors occurring during the progress of the trial, to wit: [*Specify errors complained of, as in petition in error in sec. 1275, post.*]

NOTE.—See *ante*, secs. 1250, 1251.

Sec. 1261. Causes for which new trial not granted.— A new trial will not be granted on account of the smallness of damages, in an action for an injury to the person or reputation, nor in any other action where the damages equal the actual pecuniary injury sustained.⁶ This section has been repealed.*

Sec. 1262. Application for new trial made by motion.— The application must be made by motion, upon written grounds, filed at the time of making the motion, for any of the causes enumerated by the code.⁷ It must be sustained by affidavits or depositions, showing their truth, and may be controverted by affidavits or depositions.⁸ The motion may be made by both parties to an action.⁹ Allegations of fact in a motion not supported by the record nor made part of the bill of exceptions cannot be considered.¹⁰ Nor can the refusal of a new trial, where no reasons assigned therefor are alleged in the motion, be considered;¹¹ nor will a motion be granted to let

¹ *Hart v. Johnson*, 6 O. 87; *Blackburn v. Lane*, 8 O. 81, 84.

² *Abrams v. Wills*, 6 O. 164.

³ *Schneider v. Hosier*, 21 O. S. 98.

⁴ *Jones v. State*, 20 O. 34; *Maynard v. Fellows*, 43 N. H. 255.

⁵ *White v. Thomas*, 12 O. S. 312.

⁶ O. Code, sec. 5806.

* 93 O. L. 217.

⁷ O. Code, sec. 5805.

⁸ O. Code, sec. 5808; *Bingham v. Walk*, 128 Ind. 164.

⁹ *Brainard v. Lane*, 26 O. S. 632.

¹⁰ *Waggoner v. State*, 30 O. S. 576.

¹¹ *Hoffman v. Gordon*, 15 O. S. 212; *Westfall v. Dungan*, 14 O. S. 276; *McGonnigle v. Arthur*, 27 O. S. 262.

in technical defenses.¹ The motion must specifically point out or enumerate the causes, so that both trial and reviewing court may see the errors complained of.²

Sec. 1263. Motion should be made when.—The application for a new trial must be made at the term the verdict, report or decision is rendered, within three days after the rendition thereof, unless the party is unavoidably prevented from filing the same within such time. If made upon the ground of newly-discovered evidence, it may be made within a year after final judgment.³ It has been held that this provision is mandatory, and that the court is powerless to extend the time.⁴ Some courts construe the term “unavoidably prevented” so as to allow the motion to be made after term, but others hold that it must be made at the term,⁵ which is the practice in Ohio.⁶ Where one of the three days is a Sunday it is counted, unless it is the last of the three days, when it is excluded.*

Sec. 1264. Application for new trial after term.—An application for a new trial may be made when the grounds therefor could not have been discovered before but have been discovered since the term at which the verdict, report or decision was rendered or made, by a petition, filed as in other cases, but not later than the second term after discovery, upon which summons shall issue. The facts stated in the petition will be considered denied without answer.⁷ The case should be placed on the trial docket, and the witnesses examined in open court or their depositions taken, as in other cases. Such a petition must be filed within a year after the final judgment.⁸ It is well settled that when made on the ground of newly-discovered evidence, the motion should be accompanied with the affidavit of the witness by whom the alleged facts can be proved.⁹ The applicant must also show that he has

¹ *Bush v. Critchfield*, 5 O. 109.

² *Coleman v. Gilmore*, 49 Cal. 340; *Marbourg v. Smith*, 11 Kan. 554. As to what should be stated, see *Thompson on Trials*, sec. 2759 and cases cited.

³ O. Code, secs. 5307, 5309.

⁴ *McDonald v. McAllister*, 32 Neb. 518; *Aultman v. Leahy*, 24 Neb. 288; *Davis v. State*, 31 Neb. 243, 244; *Krutz v. Craig*, 63 Ind. 561.

⁵ *Ex parte Holmes*, 21 Neb. 324.

See *State v. Hughes*, 35 Kan. 632.

⁶ *Markward v. Doriat*, 21 O. S. 637.

⁷ O. Code, sec. 5309; *Thompson on Trials*, sec. 2764.

⁸ O. Code, sec. 5309.

⁹ *Axtell v. Warden*, 7 Neb. 188-9;

Graham & W. on N. T. 1031; *Cummins v. Walden*, 4 Blackf. 303.

* *Chicago Label & Box Co. v. Washburn*, 15 O. C. C. 510; R. S. 4951.

used due diligence by stating the facts constituting the diligence, showing the time, place and circumstances under which inquiries were made.¹ The sufficiency of the application or petition under this provision may be tested by a demurrer.²

Sec. 1265. Limitation in error proceedings.—The commencement of a proceeding in error within the time prescribed by law is essential to clothe the reviewing court with jurisdiction to hear and determine the same,³ and the limitation within which such proceedings must be brought is within four months after the rendition of the judgment or final order complained of.⁴ All the papers which are necessary to be filed with the petition in error must all be filed within the statutory period in order that the proceedings may be properly commenced.⁵

Sec. 1265a. Same—Commencement of proceeding in error.—Proceedings to reverse a judgment are as truly adversary in their character as an original action; they constitute a distinct suit between the parties, resulting in a judgment. The direct requirement of the statute is that they should be instituted or commenced by petition filed in the proper court, and that summons be thereupon issued and served, or publication made as in the commencement of an action.⁶ It is not deemed to be commenced upon the mere filing of a petition in error.⁷ The mere filing of the petition in error, or the filing of the petition and issuing of a summons upon it within the limitation is ineffectual where no service of the summons is made upon the defendant in error; but where the petition is so filed and summons is so issued upon which service is duly obtained, the proceeding is commenced in proper time, although service of the writ be made after the expiration of the statutory period. The service, when so made, relates back to the date of the writ and completes as of that date the commencement of the proceeding.⁸ This is

¹ Blackburn v. Crowder, 110 Ind. 127; Toney v. Toney, 73 Ind. 34; 36 O. S. 282; Bowen v. Bowen, 36 O. S. 314; King v. Penn, 43 O. S. McCauley v. Murdock, 97 Ind. 229; 57.

Hines v. Driver, 100 Ind. 315.

⁴ O. Code, sec. 6723, amended, 93

² Brock v. Becker, 6 W. L. B. 755; O. L. 394.

Hines v. Driver, *supra*; Axtel v.

⁵ See sec. 1280, *post*.

Warden, 7 Neb. 188; Sulley v.

Kuehl, 30 Ia. 278.

⁶ Robinson v. Orr, 16 O. S. 284; R. S. 6723.

⁷ Schooner Marinda v. Dowlin, 4

⁸ Robinson v. Orr, 16 O. S. 284.

O. S. 500; Little Miami R. R. Co. v.

Hopkins, 19 O. S. 279; Railway Co.

v. Wick, 35 O. S. 247; Piatt v. Sin-

⁹ McDonald v. Ketchum, 53 O. S. 519, questioning Bowen v. Bowen, 36 O. S. 312.

applying to proceedings in error the same rules applicable to the commencement of an action, and it has been repeatedly held that the provisions relating to the commencement of an original action are considered by analogy to furnish a rule as to when proceedings in error are deemed commenced.¹ And an action is deemed commenced at the date of the summons which is served on the defendant.² And an attempt to commence an action is equivalent to the commencement of an action when the party diligently endeavors to procure service, and such endeavor is followed by service within sixty days.³ So an attempt to commence an action by filing a petition in error and causing summons to be issued and served which proves ineffectual and is set aside, will be equivalent to the commencement of the proceeding if valid service is obtained within sixty days.⁴ The mere filing of a petition in error, without causing a summons to be issued, is not an attempt to commence a proceeding in error. To constitute an attempt and a diligent endeavor to procure service so as to bring one within the saving provisions of the code, a summons must be caused to be issued before the expiration of the statute of limitations governing the action has expired.⁵

Sec. 1265b. Same—Parties can not confer jurisdiction.—Parties can not by private agreement or consent, or by voluntary appearance, confer upon the court power to hear and determine the same after the expiration of the time for the commencement thereof.⁶ A case will therefore, upon motion, be stricken from the docket if appearance has not been entered by or summons served on a defendant in error, even where the petition has been placed upon the docket upon a motion for

¹ O. Code, sec. 4988; Robinson v. Orr, 16 O. S. 284; Ross v. Willet, 54 O. S. 150; McDonald v. Ketchum, 53 O. S. 520; Bowen v. Bowen, 38 O. S. 312; Moore v. Chittenden, 39 O. S. 563.

² *Ante*, sec. 7.

³ O. Code, 4988. This provision is liberal to parties acting in good faith and who are diligent in endeavoring to procure service. But the party must diligently endeavor

to procure service and must procure it within the sixty days, and if it is actually made within sixty days the case is commenced. But if service is not made within sixty days, it is ineffectual, and may be quashed and the proceeding dismissed.

Bechthold v. Fisher, 9 O. C. C. 559.

⁴ Ross v. Willet, 54 O. S. 150.

⁵ B. & O. R. R. v. Ambach, 55 O. S. 553.

⁶ King v. Penn, 43 O. S. 57.

leave to file the petition in error, unless the plaintiff, by amendment of the petition, allege facts upon which issue may be joined, showing that he is within the saving clause of the statute as to disabilities.¹

Sec. 1265c. Same—Trial had under belief that proceeding was properly commenced.—Where a petition in error has been filed within the period of limitation and both parties have proceeded with the preparation of the case for final hearing, in the belief that the proceeding has been duly commenced and is actually pending, the defendant in error is estopped, after appearing and submitting the case, either upon oral argument or printed briefs, to question the jurisdiction of the court either of the parties or subject-matter, upon the ground that no summons in error was issued or served.² Any other rule of practice would enable parties to trifle with the court, by first requiring it to hear the case upon its merits, and then turning around and denying its jurisdiction.³

Sec. 1265d. Same—Filing petition in error.—In cases where leave is granted to file a petition in error in the supreme court, it becomes important to know whether or not it is necessary that the petition should be formally indorsed as filed by the clerk, when it has been deposited with him at the same time the motion was filed. If, at the time of depositing the motion for leave and other papers, including the petition in error, with the clerk, the necessary arrangements have been made with the clerk to have the petition filed when leave is granted, and the clerk should fail to formally indorse and file the same, an objection that there should have been a distinct act of refileing after leave granted would be technical and unsubstantial and without avail.⁴ When a paper is in good faith delivered to the proper officer to be filed, and by him received to be kept in its proper place in his office, it is filed. The indorsement upon it by the officer of the fact and date of filing is but evidence of such filing; for, if the petition had been either strung upon a thread, laid in a drawer or in a pigeon-hole, it would be filed within

¹ Bowen v. Bowen, 36 O. S. 312;
R. S., sec. 6723.

² King v. Penn, 43 O. S. 57.

³ Cameron v. Francisco, 26 O. S.
190.

⁴ Robinson v. Orr, 16 O. S. 286.

the terms of the law.¹ Where proper arrangements are made with the clerk, therefore, at the time of leaving with him all necessary papers, including the petition in error, the payment of the fee, etc., it would seem that the petition in error, for the purpose of complying with the statute of limitation as to the commencement of the proceeding in error, would be considered as on file at the time of the granting of leave.

Sec. 1265e. Same—When statute begins to run.—The statute begins to run, not from the first day of the term at which the judgment sought to be reversed was rendered, but from the day on which it was actually rendered.² A judgment may be rendered upon the coming in of the verdict, or the parties may delay the entering of the same until the ruling upon the motion for a new trial. If judgment is entered up at the time the verdict comes in, the limitation runs from the entry of the judgment, and not from the entry overruling the motion for a new trial, the latter not being a final order.³ If the cause is tried to the court without a jury, and judgment is rendered before a motion for new trial is disposed of, the time runs from the rendition of the judgment, and not from the overruling of the motion.⁴ Where a demurrer to an answer is sustained, but no judgment is rendered or order made which is definitive in its character until a subsequent term, the time within which a proceeding in error may be commenced by the defendant will be computed from the date of the final judgment or order.⁵ When an appeal has been erroneously dismissed in the lower court, and at the same term a motion is made by the appellant to reinstate the case, or, in effect, to vacate the order of dismissal, the same being continued to a subsequent term and then overruled, the appellant may commence his proceedings in error in the supreme court within the time required by statute from the overruling of the motion.⁶

Sec. 1265f. Same—Persons under disability—Against whom it runs.—The statutes relating to proceedings in error are strictly construed, and, therefore, where a judgment for or against two or more parties is sought to be reversed, it must be commenced against all of them within the limitation prescribed in order to confer jurisdiction upon the court to reverse or modify such judgment or any part of it as to either of such parties.⁷ In case the person entitled to commence such proceedings in error is under a disability, such as an infant, a person of unsound mind or imprisoned, he will be entitled to bring the same within four months from the rendition of the judgment or final order exclusive of the time of such disability.⁸ While

¹ Haines v. Lindsey, 4 O. 90, 221; Nimmons v. Westfall, 33 O. S. 221; Bishop v. Cook, 13 Barb. 329; King v. Penn, 43 O. S. 60, 61.

² West v. Maddock, 16 O. S. 418.

³ Young v. Shallenberger, 53 O. S. 291; Collins v. Mansfield, 13 O. C. 258.

⁴ Dowty v. Pepple, 58 O. S. 395.

⁵ Lafferty v. Shinn, 38 O. S. 46.

⁶ Ogontz v. Wick, 12 O. S. 333; Creighton v. Harden, 10 O. S. 579; Bentley v. Dorcas, 11 O. S. 398.

⁷ Burke v. Taylor, 45 O. S. 444;

Smetters v. Rainey, 14 O. S. 287; Jones v. Marsh, 30 O. S. 20.

⁸ R. S., sec. 6723; amended 93 O. L. 394.

the statute of limitations under consideration includes married women and those who may be under disability, that disability is now removed by statute.¹

Where, by the saving clause of the statute of limitations, the right to a proceeding in error is saved to one of the parties against whom it is rendered, it inures to the benefit of all.² When the statute has commenced to run against a party against whom a judgment has been rendered, who dies subsequent to the rendition thereof, his heirs, being under disability at the time of his death, which is not removed until after the expiration of the limitation against the ancestor, cannot prosecute proceedings in error; for it is the universal rule that where time begins to run against the ancestor, it continues to run against the heir, although the latter is under disability.³

Sec. 1265g. Same—Miscellaneous—Pleading statute—Supplying omission of party.—Pleading the limitation is not necessary, as the question whether or not a petition in error has been filed in time is determined from the record;⁴ but facts bringing a party within the saving clause must be averred in the petition,⁵ and the petition may be amended so as to bring a party within the statute.⁶ Where the name of one of several partners plaintiff in error is omitted by mistake, the reviewing court may allow such person to be made a co-plaintiff in error, even after the limitation has expired.⁷ Jurisdiction can not be questioned by a defendant in error on the ground that no summons in error has been filed, where both parties have appeared to argue the case.¹⁰

Sec. 1266. Error in common pleas court — Jurisdiction. A judgment rendered or final order made by a probate court, justice of the peace, or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the

¹ 84 O. L., p. 182.

² *Buckingham v. Bank*, 21 O. S. 181;
Wilkins v. Phillips, 8 O. 49; *Massie v. Matthews*, 12 O. 351.

³ *Williams v. Presbyterian Society*, 1 O. S. 478; *Bartlow v. Kinnard*, 88 O. S. 378.

⁴ *Railway Co. v. Wick*, 85 O. S. 247.

⁵ *Piatt v. Sinton*, 35 O. S. 282; *Hanover v. Sperry*, 35 O. S. 244.

⁶ *Bowen v. Bowen*, 36 O. S. 312.

⁷ *Secor v. Witter*, 39 O. S. 218.

¹⁰ *King v. Penn*, 45 O. S. 57; *Railroad Co. v. Mara*, 26 O. S. 185.

court of common pleas, may be reversed, vacated or modified by the court of common pleas.¹ This will include proceedings and final orders of township trustees and county commissioners in establishing ditches and roads, and other boards exercising similar judicial functions.² An order of a justice of the peace in discharging or refusing to discharge an attachment may be reviewed on error by the court of common pleas, and for that purpose a bill of exceptions may be taken. But the weight of the evidence will not be considered or the judgment of the court thereon disturbed.³ But if there was no evidence tending to sustain the ruling it may be reversed for this reason.⁴ And so may a judgment of forcible entry and detainer by a justice be reviewed.⁵ But an order of a justice overruling a motion to dismiss an action is not reviewable.⁶

Sec. 1267. Error in the circuit court — Jurisdiction.— Jurisdiction in error is conferred on the circuit court to reverse, vacate or modify a judgment rendered or final order made by the court of common pleas, or a judge thereof, for errors appearing upon the record. All errors assigned in the petition in error must be passed on, and when a judgment is reversed and remanded for a new trial or hearing, the mandate from the circuit court must state the errors found upon the record.⁷ The only errors which may be assigned in the circuit court are those appearing on the record to have been committed by the court of common pleas.⁸ A judgment of the common pleas court overruling a demurrer and for costs thereon or with leave to answer is not final, and is not reviewable;⁹ nor is an order of a judge of such court made at chambers,¹⁰ or the refusal of the common pleas court to allow a petition in error in forcible detainer proceedings,¹¹ reviewable. A decision of

¹ O. Code, sec. 6708.

⁶ *Bruder v. Biehl*, 1 O. C. C. 85.

² *Haff v. Fuller*, 45 O. S. 494-7; *Commissioners v. Jenkins*, 19 O. S. 848; *Fravert v. Finrock*, 43 O. S. 885. Two-mile assessment proceedings. *Lewis v. Laylin*, 46 O. S. 664.

⁷ O. Code, sec. 6709; amended 93 O. L. 56.

⁸ *Evans v. Jones*, 8 W. L. B. 308. See *Powers v. Reed*, 19 O. S. 189.

⁹ *Hart v. Murray*, 3 O. C. C. 431; *Krause v. Stichenoth*, 15 O. C. C. 199.

¹⁰ *Atwood v. Whipple*, 5 O. C. C. 118; *aff'd* in 25 W. L. B. 314; 48 O. S. 308. Common pleas court does not mean a judge of that court. *Id.*

¹¹ *Rothwell v. Winterstein*, 42 O. S. 249.

³ *Kelly v. Nichols*, 10 O. S. 818.

⁴ *Willinger v. Bramsche*, 7 O. C. C. 208.

⁵ *Seville v. Wagner*, 46 O. S. 52; *Baer v. Otto*, 84 O. S. 11; *Young v. Gerdes*, 42 O. S. 102.

such court rendered in a case appealed from the county commissioners,¹ or from the probate court in appropriation proceedings, may be reviewed, the circuit court not being confined to the bill of exceptions taken in such proceedings, but may look into the entire record.² The circuit court stands on a different footing from that of any other reviewing court as to the determination of questions of fact.³ A judgment rendered by default before the expiration of the answer day may be reviewed and reversed.⁴ It is required upon application of any party excepting to a ruling or decision made by it during the trial, or on motion for a new trial, to find from the evidence, and state on the record, the facts upon which the alleged error arises, or which may be material in determining whether error has intervened or not.⁵ But it has no authority to make a finding of facts in a case before it where the evidence is all set forth in a bill of exceptions,⁶ or upon a motion to dismiss a petition in error.⁷

Sec. 1268. Error in the supreme court — Jurisdiction.—

The original jurisdiction conferred upon the supreme court by the constitution⁸ is in *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*.⁹ It would be wholly inconsistent with, and in a great measure destructive of, the judicial system it ordains, to suppose that this original jurisdiction can be enlarged by law. There was no prohibition against it, nor was any necessary, as the court can only exercise such powers as were conferred upon it by the constitution, or as the legislature was authorized by that instrument to grant. It follows that to negative the existence of a power it is not necessary to show that it is forbidden by the constitution. It is sufficient that that instrument neither directly nor indirectly confers it. It cannot be supposed that, by the general grant of legislative power in the second article of the constitution, the legislative authority to confer powers upon courts is extended beyond the authority vested in the assembly by the fourth or judicial

¹ Mannix v. Commissioners, 48 O. S. 210, and cases cited.

² Street Ry. Co. v. Street Ry., 6 O. C. C. 364.

³ Ogborn v. Taylor, 6 O. S. 199; Sturgeon v. Hull, 8 O. C. C. 269; Street Ry. Co. v. Street Ry. Co., *supra*.

⁴ Williamson v. Nicklin, 84 O. S. 123.

⁵ O. Code, sec. 6710.

⁶ Senff v. Pyle, 46 O. S. 102.

⁷ Railway v. Thurstin, 44 O. S. 525.

⁸ Art. 4, sec. 2, Const.

⁹ Art. 4, sec. 2, Const.

article.¹ The appellate jurisdiction is such as may be provided by law,² and such jurisdiction extends only to those judgments and decrees of courts created and organized in pursuance of the provisions of the constitution.³ Jurisdiction to review cases decided by it may properly be conferred upon the supreme court.⁴

Jurisdiction is conferred upon the supreme court to reverse, vacate or modify any judgment rendered or final order made by the circuit court, court of common pleas, probate, or the superior court of any city or county, for errors appearing upon the record.⁵ The section of the Ohio Code allowing prosecution of proceedings in error has been materially changed, allowing error to be predicated upon a judgment or final order made by a judge of the circuit court, or a judge of the common pleas court, at chambers, also any judgment rendered or final order made by any insolvency court. The section as amended is as follows:

"A judgment rendered, or a final order made, by any circuit court, or a judge thereof, court of common pleas, or a judge thereof, probate court, insolvency court, or the superior court, or a judge thereof, may be reversed, vacated, or modified by the supreme court, on petition in error, for errors appearing on the record, in any case in *quo warranto*, *mandamus*, *habeas corpus*, *procedendo*, or in which is involved the construction of the constitution of the United States, or of the State of Ohio, or the jurisdiction of any court of this state, or the construction or validity of a treaty or statute of, or authority exercised under the United States, or in which the decision is contrary to that of any circuit court, and not in accord with the previous decision in the supreme court, or in which is involved, exclusive of interest and costs, the sum or value of more than three hundred dollars; but no petition in error in such cases, except as to the judgment or final order of the circuit court, or a judge thereof, or of the general term of the superior court of Cincinnati, shall be filed with-

¹ Kent v. Mahaffey, 2 O. S. 498.

⁴ Longworth v. Sturges, 4 O. S. 690.

² Art. 4, sec. 2, Const.

⁵ O. Code, sec. 6710, as amended

³ Logan Branch Bank, Ex parte, 91 O. L. 278; Whittaker's Ohio Civ. Code (4th Rev. ed.), p. 493.

1 O. S. 432.

out leave of the supreme court, or judge thereof, and the supreme court shall not in any civil cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of evidence; and on application of any party excepting to a ruling or decision of the circuit court during the trial, or on motion for a new trial, such court shall find from the evidence, and state on the record the facts which the alleged error arises, or which may be material in determining whether error has intervened or not."

The supreme court may revise a judgment of a probate court in proceedings to appropriate land for right of way;² or of the court of common pleas in a contested election;³ or an order by a judge at chambers for the allowance of temporary alimony;⁴ or an order made by the intermediate reviewing court dismissing a petition in error filed to modify a final order made by the trial court as to the custody of children;⁵ or an order of the common pleas in bastardy proceedings;⁶ or an order improperly dismissing an appeal.⁷ The language of the code, "any judgment or final order made," is broad, so that almost any case falling within the meaning of those terms may be reviewed by the supreme court.⁸ Whether an order is reviewable or not is to be determined by its substance and effect, without regard to its legal or equitable nature.⁹

Application should not be made directly to the supreme court to review proceedings of courts inferior to the circuit,¹⁰ but redress must first be sought in the circuit court.¹¹ In exceptional cases, where that court will not be in session for such a period of time that it may cause serious invasion of rights by delay, the supreme court may take cognizance and

¹ 93 O. L. 255.

² *Railroad Co. v. Sullivan*, 5 O. S. 276. See *Railway Co. v. Bailey*, 39 O. S. 170.

³ *Lehman v. McBride*, 15 O. S. 573.

⁴ *King v. King*, 38 O. S. 370.

⁵ *Neil v. Neil*, 38 O. S. 558; *Cox v. Cox*, 19 O. S. 502.

⁶ *Hobbs v. Beckwith*, 6 O. S. 252.

⁷ *Eaton, etc., Railway Co. v. Var-num*, 10 O. S. 622; *Alsdorf v. Reed*, 45 O. S. 653.

⁸ See sec. 1236, as to final orders.

⁹ *Railroad Co. v. Sloan*, 31 O. S. 1.

¹⁰ *Carrol v. O'Conner*, 25 O. S. 617.

¹¹ *Benham v. Conklin*, 3 O. S. 509.

promptly correct errors.¹ This cannot be done, however, except upon a motion for leave upon a proper showing. In ordinary cases, however, the rights of a complainant may be protected by a stay of the execution of a judgment. The refusal of an alternative writ of *mandamus* is not reviewable on error, as the proper course in such cases is to make application directly to the supreme court.² Nor can an order made upon a motion to dismiss a proceeding in error by the circuit court be reviewed upon a finding of facts, as that court has no power to make a finding of facts in such a case.³ Nor has the supreme court power to reverse a judgment of the circuit court reversing a judgment of the court of common pleas remanding the cause for a new trial. The supreme court may in equity cases render final judgment and remand for execution, or may reverse and remand for a new trial.⁴ A judgment may be reversed on the ground that the lower court had no jurisdiction, and judgment rendered for costs on error.⁵ The supreme court has no power to review the action of a circuit court in overruling a motion for a new trial at a term subsequent to the term at which it was rendered, unless the error complained of is shown by a bill of exceptions taken to the order of the court overruling the motion, or by a finding of facts by the court.⁷

Sec. 1269. Parties in error.—It is a general rule that a reviewing court does not acquire jurisdiction of the subject-matter of a case, so as to authorize it to reverse or modify a judgment or order made by a lower court, where there is a want of parties;⁸ yet jurisdiction may be acquired where the party for whom the judgment was rendered comes before

¹ *Railroad Co. v. Sloan*, 81 O. S. 1-14 (1876); *Benham v. Conklin*, *supra*.

² *State v. Cappeller*, 87 O. S. 121.

³ *Railway Co. v. Thurstin*, 44 O. S. 525. A bill of exceptions should be taken.

⁴ *Halderman v. Larrick*, 44 O. S. 438.

⁵ *Bank v. Sawyer*, 88 O. S. 839-843. It may render the decree required by the facts. *Yeoman v. Lasley*, 40 O. S. 539.

⁶ *Burke v. Jackson*, 23 O. S. 268;

Moore v. Boyer, 42 O. S. 312. A court dismissing a cause for want of jurisdiction has no power to render judgment for costs. *Monton v. McLeary*, 8 O. S. 205; *Moore v. Boyer*, *supra*.

⁷ *Brown v. Coal Co.*, 48 O. S. 542.

⁸ *Jones v. Marsh*, 30 O. S. 20; *Smetters v. Rainey*, 14 O. S. 287; *Abair v. Bank*, 3 O. C. C. 290. A defect of parties not objected to is considered waived in error proceedings as well as in other cases. *Cairnes v. Knight*,

17 O. S. 68.

the court.¹ All parties interested in a judgment, however, should be made parties in error;² and in a proceeding to reverse a judgment obtained by several creditors, only one of whom was plaintiff below, and others were cross-petitioners, their interests are united, the judgment is a unit and cannot be reversed as to part and affirmed as to others, so that it is necessary to bring all before the court, though service upon one will prevent the statute from running as to all.³ But where judgment is rendered in favor of two of three joint defendants, leaving the case undisposed of as to the third, the latter is not a necessary party in error.⁴ All of the defendants to a joint judgment should be made parties to a proceeding in error to reverse it; and if any such judgment debtor by mistake is not made a party within the required time, the court may allow the omitted party to become a co-plaintiff, as the power of amendment in this respect, notwithstanding the statute, is as ample in proceedings in error as in other civil actions.⁵ Where an action against two defendants, one of whom is in default for answer is tried on the claims of the plaintiff, and the other defendant not in default, the one in default is then not a necessary party to and need not be joined in error proceedings.*

The omission of a party to a petition in error will not deprive the reviewing court of jurisdiction of the case.⁶ The reason for this rule is, that in a judgment which is an entirety there can be no severance, and all must recover or none, and therefore the case should be saved as to all rather than that one should lose his right.⁷ A judgment by an inferior reviewing court upon error will not be disturbed by the supreme court, upon the ground that a party was not properly served with summons in such lower court, where the record shows that the party appeared by counsel and submitted the case on its merits.⁸ In general, a proceeding in error must be prose-

¹ Wangerien v. Aspell, 47 O. S. 250.

² Sturges v. Longworth, 1 O. S. 544; Smetters v. Rainey, 14 O. S. 287; s. c., 13 O. S. 568; Veach v. Kerr, 41 O. S. 179; Creed v. Bank, 1 O. S. 1.

³ Buckingham v. Bank, 21 O. S. 131.

⁴ King v. Bell, 36 O. S. 460.

⁵ Secor v. Witter, 39 O. S. 218, 229; Wilkins v. Phillips, 3 O. 49; Meese

v. Keefe, 10 O. 362; Bradford v. Andrews, 20 O. S. 208; Massie v. Mathews, 12 O. 351; Sturges v. Longworth, 1 O. S. 544; Bank v. Green, 40 O. S. 431. See Wangerien v. As-

pell, 47 O. S. 250. Where some of the defendants to a joint judgment were not served, but afterwards released all errors in the proceeding, those who were served can not have the judgment reversed for such error or irregularity. Ash v. McCabe, 21 O. S. 181.

⁶ Bank v. Green, 40 O. S. 431.

⁷ Moore v. Armstrong, 10 O. 17.

⁸ Hammond v. Hammond, 21 O. S. 620.

* City of Toledo v. Schulters, 11 O. C. C. 528; 5 Oh. Dec. 269.

cuted by a party to the record and to the judgment sought to be reversed; but if such party die before error is prosecuted, his administrator or executor, or heir, according to the nature of the subject-matter of the judgment, who becomes privy thereto by operation of law, may commence and prosecute error without first being made a party to the judgment by revivor or otherwise;¹ and where the heirs or legal representatives seek to institute such proceedings, they must do so in their own names, and not in the name of the deceased party.² In such cases, the facts upon which the law operates in creating the privity must be averred in the petition in error, and are issuable and must be verified.³ The want of proper parties in a lower reviewing court, not having been there objected to, will be considered as waived in the supreme court, and cannot therefore be assigned for error. Such was the rule established by the code in civil actions proper, and by analogy it is applicable to error proceedings.⁴

Sec. 1270. The petition in error.—The proceedings to obtain a reversal, vacation or modification of a judgment or final order should be by a petition in error filed in the reviewing court. The office of such petition is to set forth all the errors complained of.⁵ No other pleadings are necessary on either side,⁶ except that a party may file a cross-petition in error.⁷ A demurrer cannot be filed, as the judgment will be affirmed if no error appears on the record; otherwise it will be reversed or modified.⁸ The case is heard upon the record as shown by the papers constituting the same, which must accompany the petition in error.⁹ The question here to be considered, therefore, is the assignment of errors, which is important and runs through the whole proceeding. This stage of the case should be kept in mind during the progress of the trial, and every point saved for review. The exceptions, bills of exceptions and motion for new trial are all parts of the proceeding in error. All exceptions are usually shown in the

¹ *Hammond v. Hammond*, 21 O. S. 620; *Hanover v. Sperry*, 35 O. S. 244; 8 Cowen, 333, 336; *Cisna v. Beach*, 15 O. 300.

² *Kennard v. Kennard*, 35 O. S. 660.

³ *Hanover v. Sperry*, 35 O. S. 244.

⁴ *Cairnes v. Knight*, 17 O. S. 63.

⁵ O. Code, sec. 6713.

⁶ *Niven v. Smith*, 2 W. L. M. 465.

⁷ See sec. 1278, *post*.

⁸ *Ross v. Tailoring Co.*, 7 O. C. C. 54.

⁹ See sec. 1280, *post*.

motion for new trial, upon which the petition in error is founded. Petitions in error to the judgment of the circuit court or a judge thereof, or the general term of the superior court, are filed in the supreme court as matter of right, but when filed to any other court, as the common pleas, leave must be obtained.¹

In considering the matter of the assignment of errors, there are two fundamental principles to be kept in mind, which have heretofore been pointed out, namely, that courts of error only concern themselves with controversies affecting the substantial rights of litigants,² and that they will not consider an alleged error unless excepted to at the time.³ The general rule is that errors not specifically assigned will not be noticed, unless substantial justice requires it.⁴ The rule in this respect is more stringent in the supreme court than in the circuit court. The circuit court examines into the record and evidence, and in some instances looks beyond the assignment of errors, though not obliged to.⁵ But an error committed by a trial court, not included in a motion for a new trial or assigned in the circuit court, will not be considered by the supreme court unless for special or peculiar reasons affirmatively appearing on the record,⁶ such as affect the jurisdiction of the court.⁷ And where there is no assignment of errors, the judgment will be affirmed,⁸ as the presumption in such case, or where there is no specific assignment of errors, is that they have been waived.⁹ A general assignment of errors may, however, in some instances be noticed.¹⁰ An assignment that the judgment was rendered for the wrong party strictly raises the question whether the proper judgment has been rendered on the pleadings and facts.¹¹ That an objection may be made in the supreme court to the sufficiency of a petition to con-

¹ O. Code, sec. 6710, amended 93 O. L. 255; *Benham v. Conklin*, 3 O. S. 509; *State ex rel. v. Williams*, 26 O. S. 170; *Kosminski v. Barrett*, 34 O. S. 163.

² *Saxton v. Plymire*, 3 O. C. C. 210. See *ante*, sec. 1236.

³ See *ante*, sec. 1237; *Seymour v. Railway Co.*, 44 O. S. 12; *Woodward v. Sloan*, 27 O. S. 592.

⁴ *Booth v. Hubbard*, 8 O. S. 243.

⁵ *Davis v. Hines*, 6 O. S. 478; *Insurance Co. v. McGookey*, 83 O. S. 555.

⁶ *Hills v. Ludwig*, 46 O. S. 878; *Levi v. Daniels*, 23 O. S. 88.

⁷ *Levi v. Daniels*, 23 O. S. 88; *Pollock v. Cohen*, 83 O. S. 514.

⁸ *Wells v. Martin*, 1 O. S. 886.

⁹ *Pollock v. Cohen*, 83 O. S. 514.

¹⁰ *Hettrick v. Wilson*, 12 O. S. 188.

¹¹ *Insurance Co. v. McGookey*, 83 O. S. 555.

stitute a cause of action, in the absence of such an assignment of error, notice of such objection must appear on the record in the reviewing court before the case is heard, and this can be done on leave, or by agreement of parties.¹ Nor will the supreme court consider any errors apparent on the record which were not raised in the trial court nor assigned in the circuit court.² To authorize the supreme court to review the proceedings and judgment of a lower court in overruling a motion for a new trial on the ground that the verdict is against the evidence, it must appear that the bill of exceptions contains all the testimony.³ Where, during the pendency of a petition in error, the court whose judgment is under review makes an erroneous order striking a bill of exceptions, on which the proceeding in error is based, from the record, such order cannot be reviewed by an independent petition in error, but may be reviewed in the pending proceeding.⁴ Nor can a second petition in error be filed upon the same record, as all questions existing thereon, whether actually presented or not, are deemed settled.⁵ Want of merit in the assignment of a petition in error is no ground for dismissal, as ample provision is made for assessing a penalty for a groundless proceeding.⁶

Sec. 1271. Motion for leave to file petition in error.—Petitions in error are filed in the common pleas and circuit courts, and in the supreme court to the circuit court, as matter of right,⁷ except petitions in error to the judgment of a justice in forcible entry and detainer, which can only be filed upon leave of the court or judge.⁸ But no petition in error can be filed in the supreme court, except to a judgment or final order of the circuit court, or a judge thereof, or of the general term of the superior court of Cincinnati, without leave of court or a judge

¹ *Youngstown v. Moore*, 30 O. S. 133-8.

² *Railway Co. v. Construction Co.*, 49 O. S. 681; *Woodward v. Sloan*, 27 O. S. 592; *Pollock v. Cohen*, 32 O. S. 514; *Davis v. Hines*, 6 O. S. 428; *Randall v. Turner*, 17 O. S. 262.

³ *Railway Co. v. Probst*, 30 O. S. 104; *Everett v. Sumner*, 32 O. S. 562; *Powers v. Railway Co.*, 33 O. S. 429. It must appear that the supreme court has precisely the same evi-

dence before it as was before the jury. *Hicks v. Person*, 19 O. 426; *Wilson v. State*, 2 O. S. 819; *Eastman v. Wright*, 4 O. S. 157; *Ide v. Churchill*, 14 O. S. 872; *Cantwell v. State*, 18 O. S. 477.

⁴ *Potter v. Myer*, 31 O. S. 103.

⁵ *Pollock v. Cohen*, 32 O. S. 514.

⁶ *Edwards v. Griffiths*, 48 O. S. 664.

⁷ S. C. Rule 18.

⁸ R. S., sec. 661a.

thereof.¹ In such cases a motion must be filed, accompanied with either a printed or plainly written brief, containing a statement of the questions presented.² Notice in writing of the intended application, briefly specifying the errors relied on, should be given to the adverse party or his attorney, at least ten days when made to the court, and five days when made to a judge, before the hearing of such motion, unless special circumstances require such notice to be abbreviated.³ The court may, in its discretion, at the time of granting leave, if ten days' notice has been given the adverse party or his attorney, when it finds error plainly apparent on the record, all the judges sitting at the hearing concurring, enter a judgment of reversal, vacation or modification without the issue or service of summons in error.⁴

Sec. 1272. Petition in error to justice of the peace.—

Plaintiff in error says that in an action pending before C. B., one of the justices of the peace in and for the township of —, — county, Ohio, wherein the plaintiff in error herein, J. S., was defendant, and the defendant in error herein, P. W., was plaintiff, the said J. S., plaintiff in error, filed his motion to dismiss an attachment in said case issued, supporting the same with the affidavit of the plaintiff in error, and that on the — day of —, 18—, on the trial of said motion, said attachment was by the consideration of said justice of the peace held and said motion was overruled, and that thereafter judgment was duly rendered against the said J. S., the plaintiff in error, all of which more fully appears by a copy of the record of the judgment and proceedings in the case duly certified, hereto attached, marked "A," and made a part of this petition.

The said plaintiff in error avers that there is error in the said record and proceedings, and that the court committed error in the trial of said action on said motion in this, to wit:

1st. That the court erred in holding said attachment and overruling said motion of the plaintiff in error to dismiss said attachment.

2d. That judgment was given by said justice upon said motion against the plaintiff in error when it ought to have been given for the plaintiff in error.

¹ O. Code, sec. 6710, as amended 93 O. L. 255.

² S. C. Rule 18.

³ S. C. Rule 8.

⁴ O. Code, sec. 6713. The usual practice in such cases is, where the

case is thought to be of such character as to be easily determined, for counsel to agree and suggest that a case may be determined upon its merits upon such motion.

3d. That the judgment of the justice is against the law and the evidence.

The said J. S., plaintiff, therefore prays that the said judgment on said motion and attachment may be reversed and the said plaintiff in error may be restored to all things he has lost by reason thereof.

NOTE.—From *Seville v. Wagner*, 46 O. S. 52.

Sec. 1273. Petition in error from final order made by county commissioners — filed in court of common pleas.—

In the Court of Common Pleas of — County, Ohio.

U. C., Plaintiff,

vs.

L. C. and The Board of Commissioners of — County, Ohio, Defendants.

} Petition in error.

The said plaintiff says that he is a resident of — township, in said county; that he is the owner of and resides on the following tract of land, through which runs a state road, known as the P. and B. road, to wit: The west half of the southwest quarter of section number —, etc.

Plaintiff says that on the — day of —, 18—, the said defendant, I. F., recovered a final order before said board of commissioners, defendant purporting to vacate a portion of said road, which runs from the west line of the northwest quarter, etc. [*Describe route of road.*]

The plaintiff further says that said board of commissioners, at the instance of said I. F., are about to issue to said F. an order purporting to vacate so much of said road as is last above described, and directing him to close the same under the final order aforesaid.

A duly authenticated and certified copy of the final order aforesaid and the proceedings whereon the same is founded is hereto attached, marked "A," and made a part hereof.

Plaintiff says that in the record and proceedings aforesaid is manifest error in this, to wit:

1st. Said order of vacation is based on a petition to alter said state road. Said state road was established prior to —, 18—, and the record shows that said alteration forms no part of said state road as required by law to support an order to vacate any portion of said state road.

2d. The viewers of said state road did not ascertain and report the distance which public travel would be increased by vacating said road, whereas the record shows that the distance is materially and largely increased by said proposed vacation.

3d. Said board of commissioners erred in not sustaining said exceptions of this plaintiff and D. P. to the report of said viewers.

4th. Said commissioners did not find, nor does the record show, that said road has become useless.

5th. The record shows that said road so ordered to be vacated is a part of a state road sixty feet wide; that said order of vacation is based on the establishment of a county road forty feet wide, whereas the petition did not pray for the narrowing of said road or any part thereof.

6th. Said new road established by said board of commissioners runs in an entirely different direction from said state road, forms no part thereof, and said commissioners had no warrant of law in said proceedings to make the same the basis for vacating a part of said state road.

7th. Said order of vacation is void for uncertainty in this, to wit: It directs "that so much of the old road as lies between the intersecting points of said alteration be vacated," whereas the record shows that there are no such intersecting points, and that no part of said state road lies between the point of commencement and the point of termination of said new road.

Plaintiff says he is affected by said order, and prays that the same may be set aside, reversed and held for naught.

L. R. H. and

A. W.,

Attorneys for Plaintiff.

Sec. 1274. Petition in error to the court of common pleas — filed in circuit court.—

[Caption.]

Plaintiff in error says that at the — term, 18—, of the court of common pleas of — county, Ohio, defendant in error recovered a judgment, by the consideration of said court, against plaintiff in error, in an action then pending therein, wherein plaintiff in error was plaintiff, and defendant in error was defendant, a transcript of the docket and journal entries whereof is filed herewith.

There is error in the said record and proceedings, in this, to wit:

1st. Said court erred in its finding of facts and conclusions of law in said action.

2d. Said court erred in rendering judgment for defendant in error, when it should have been given for plaintiff in error.

3d. The facts set forth in the answer of defendant in error are not sufficient in law to constitute a defense to the action of plaintiff in error; and

4th. Other errors apparent upon an inspection of the record.

Plaintiff in error therefore prays that said judgment may be reversed, and that it be restored to all things it has lost by reason thereof.

Sec. 1275. Petition in error to the circuit court — filed in supreme court.—

The plaintiff in error says that at the — term, 18—, of the circuit court in and for said — county, Ohio, the defendant in error, A. L., recovered a judgment, by the consideration of said court, against the plaintiff in error in an action then pending therein, wherein the said A. L. was plaintiff and the said W. H. L. was defendant, a transcript of the docket and journal entries whereof, with the original pleadings and bill of exceptions, is filed herewith.

There is error in the said record and proceedings in this, to wit:

1. The said court erred in overruling the motion of plaintiff in error to require the said A. L. to consolidate the allegations of his petition into one cause of action.

2. The said court erred in overruling the demurrer of plaintiff in error to the first cause of action set out in the petition.

3. The said court erred in the trial of said cause in admitting evidence offered on behalf of said A. L. to which the plaintiff in error objected.

4. The said court erred in rejecting evidence offered by the plaintiff in error, and to which plaintiff in error excepted.

5. The said court erred in its second, third, fourth, fifth, sixth, seventh, eighth and ninth conclusions of fact for the reason that the same are against the evidence and are not sustained by sufficient evidence.

6. The said court erred in not observing the rule requiring clear and convincing proof for the reformation of a written contract.

7. The said court erred in overruling the motion of plaintiff in error for a new trial.

8. The said judgment was given for the said A. L. when it ought to have been given for the plaintiff in error.

9. The said findings and judgment are contrary to law.

10. The court erred in its findings and conclusions of law.

Plaintiff in error therefore prays that said judgment may be reversed and that it be restored to all things it has lost by reason thereof.

Sec. 1276. Issue and service of summons in error.—

Upon the filing of a petition in error a summons will, upon the written precept of the plaintiff in error, be issued as in the commencement of an action; or service be made by publication.¹ Service may also be made on the attorney of record,² though where it is directed to only one defendant, service on the attorney of all the defendants is good only as to the one

¹ R. S. sec. 5048, par. 7. The statutes are silent as to the county in which the publication shall be made. I should deem it best to give notice in the county where the action was originally commenced, as the theory of publication is that the non-resident will notice anything that affects his property rights in the county where situated.

² O. Code, sec. 6713.

named in the writ.¹ If issued in vacation, it shall be returnable on or before the first day of the term of the court; if issued in term time, it shall be returnable on a day therein named.² The same rule days are adopted as in the trial court. The writ may be directed to the sheriff of any county where a defendant or his attorney of record is found.³ If the last publication or service of the summons be made ten days before the end of the term, the case will stand for hearing at that term. Service of summons need not be made where a petition in error is filed on leave of court, but only ten days, notice of such motion for leave need be given.⁴ Service of process may also be waived and appearance entered. The waiver of process and entry of appearance upon a petition in error prior to the filing of the petition has no effect where the defendant in error dies before the petition is actually filed; and if no other service is made before the limitation has expired, it should be dismissed.⁵ It has already been stated that service must be made before the limitation for the commencement of the proceedings in error has expired.⁶

Sec. 1277. Answer in error.—While it is true that there are no pleadings filed in a proceeding in error excepting the petition in error, and that the case is heard upon the record,⁷ yet a defendant in error may be permitted to file an answer to a petition in error for the purpose of setting up any facts constituting a defense to the proceeding which have occurred subsequent to the rendition of the judgment or order complained of by the plaintiff in error. It is proper practice to allow a defendant in error to allege facts showing that the plaintiff in error has waived the error of which he complains.⁸ A settlement of the case may be shown by an answer in error;⁹ and it may likewise be shown in the supreme court that, after a cause has been remanded to the trial court by the circuit court, the parties voluntarily appeared in the trial court without objection or suggestion by the plaintiff that he

¹ *Buckingham v. Bank*, 21 O. S. 181.

² O. Code, sec. 6713.

³ O. Code, sec. 6714.

⁴ O. Code, sec. 6718.

⁵ *McGuire v. Ranney*, 49 O. S. 372; *Cisna v. Beach*, 15 O. 300.

⁶ See sec. 1265, *ante*.

⁷ *Ante*, sec. 1270.

⁸ *Saxton v. Plymire*, 8 O. C. C. 209.

⁹ *Matthews v. Davis*, 39 O. S. 54.

intended to prosecute error to the reversal of the circuit court. This should be brought to the attention of the supreme court by answer, and not by a motion for diminution of record.¹

Sec. 1278. Cross-petition in error.—A defendant in error may file a cross-petition in error for the reversal of errors prejudicial to him and not assigned in the petition of the plaintiff in error.² It must be filed within the same time as the petition in error,³ and without leave of court.⁴ Nor is it necessary that a summons in error issue.⁵

Sec. 1279. Form of cross-petition in error.—

[*Caption.*]

Now comes the said E. J., one of the defendants in error, [and with leave of court] for his cross-petition in error in said cause against plaintiff in error and the co-defendants in error says that he adopts the allegations of said petition in error and the exhibits and copies of record and journal entries as a part hereof, and avers that he has an interest in said finding, order, judgment and decree, that the same was made against this defendant and affects his substantial rights in the premises, and avers that there is manifest error in said finding, order, judgment and decree of said circuit court of — county, Ohio, as follows: [*Specify errors as in petition in error.*]

NOTE.—From *Brown v. Kuhn*, 45 O. S. 93.

Sec. 1280. What must be filed with petition in error.—The plaintiff in error must file with the petition in error either a transcript of the final record, or a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of.⁶ The transcript mentioned in the code to be filed with the petition in error is a complete transcript of the record, if that has been made up; if not, it may be made from the files.⁷ And a petition in error will be stricken from the files when not accompanied by a complete certified transcript,⁸ or the

¹ *Collins v. Davis*, 32 O. S. 76. See, also, *Clippinger v. Insurance Co.*, 26 O. S. 404.

² *Bundy v. Iron Co.*, 35 O. S. 80. See *Shinkle v. Bank*, 22 O. S. 516.

³ *Mannix v. Purcell*, 46 O. S. 102; *Wade v. Kimberley*, 5 O. C. C. 33.

⁴ *Bundy v. Iron Co.*, *supra*.

⁵ *Brown v. Kuhn*, 40 O. S. 463.

⁶ O. Code, sec. 6716.

⁷ *Jennings v. Mendenhall*, 3 O. S. 439.

⁸ *Johnson v. State*, 4 O. C. C. 524.

original papers;¹ or bill of exceptions when necessary.² And where all the assignments of error are based on a bill of exceptions, which is not filed until after the limitation has expired, the petition in error may be dismissed.* The original papers can not be substituted for a transcript.³ What constitutes the record of a case is regulated by statute,⁴ and a reviewing court has no control over it and can not make any change therein, but corrections must be made in the court where the record is made.⁵ Where all the papers necessary to exhibit the errors complained of are not filed with the petition in error, the reviewing court is not deprived of its jurisdiction, but may require the provisions of the statute to be complied with, and for failure so to do may dismiss the case.⁶ If the record has not been made in the lower court and the original papers and pleadings are filed in the supreme court, the same may be temporarily withdrawn for a reasonable time for the purpose of making the record, or direct copies thereof may be made and the originals returned to the inferior tribunal.⁷

Sec. 1281. Order of docketing and hearing cases in supreme court.—All cases brought in or taken to the court must be entered on the docket in the order in which they are commenced, received or filed, and they must be taken up and disposed of in the same order, except that the court may take up and dispose of the following classes of cases in advance of their order on the docket: (1) Cases where the persons seeking relief have been convicted of felony; (2) cases involving the validity of any tax levied or assessment made, or the power to make such levy or assessment; (3) cases involving the construction or constitutionality of any statute, (4) or any question of practice where the questions arising are of general public interest; (5) and proceedings in *quo warranto*, (6) *mandamus*, (7) *procedendo*, or (8) *habeas corpus*; (9) and cases of

¹ *Rutherford v. Railroad Co.*, 3 W. L. B. 826. Leave may be granted to amend the defect. *Id.* See *Nimmons v. Westfall*, 38 O. S. 213, where clerk failed to file papers.

² *Chatfield v. Swing*, 5 W. L. B. 14; *Railway Co. v. Thurstin*, 44 O. S. 525.

³ *Stewart v. Williams*, 15 O. S. 484; *Stanley v. State*, 23 O. S. 531.

⁴ O. Code, sec. 5334.

⁵ *Smith v. Board*, 27 O. S. 44.

⁶ *Barr v. Closterman*, 7 O. C. C. 363. The court of common pleas may be

ordered to send up a perfect transcript of its record, though it cannot be required to amend its record. *Wood v. Newkirk*, 15 O. S. 295. It is error in the court of common pleas to dismiss an appeal from a justice for the reason that the transcript does not state the form of action, or that he has omitted to send up a bill of exceptions. *Humiston v. Anderson*, 15 O. S. 556.

⁷ O. Code, sec. 6716.

* *Townsend v. Harrison*, 58 O. S. 398.

general interest to the public, where two or more of the circuit courts of the state have held the law directly opposite on like facts; (10) where the relief sought is damages for personal injury, or (11) for death caused by negligence, and the person injured makes affidavit that he is, or, in case of death, the widow, or any of the next of kin to the deceased, make affidavit that they are dependent for their livelihood upon their daily labor; and all cases in which a trust fund for the care, support or education of any minor or imbecile person is involved.¹ It is necessary, in order to take the benefit of this provision, that a motion be filed to take a cause out of its order, stating therein the special reasons therefor, except in criminal cases.² When a case is reached in its regular order, and there are other cases on the docket involving the same questions, or some of them, the latter may be taken out of their order and disposed of with the case so reached. When a case is disposed of, and again comes into the court, it will be taken up as if it had its original place on the docket.³

Sec. 1282. Oral arguments may be had, when.—In all cases in the supreme court oral arguments may be heard when either party requests it;⁴ but the arguments of counsel may be transmitted to the court, in which case they should be placed on file with the papers and read by the court in the investigation of the cause; and in cases in which the constitutionality of any law of the state is involved, the court will, upon request, allow counsel, not exceeding two on a side in addition to the counsel engaged by the parties, to be heard orally or in writing as such counsel prefer.⁵

Sec. 1283. Record must be printed in supreme court.—When a petition in error is filed in the supreme court, so much of the record to be reviewed as will show the error complained of must be printed, and ten copies thereof filed with the papers, which printing the plaintiff in error must have done, or he may deposit with the clerk sufficient money to pay the costs thereof; and if he fail for sixty days, after filing the petition, to file such printed copies or to make such deposit, the

¹ R. S., sec. 440; 88 O. L. 881.

⁴ See Supreme Court Rules, 2, sec.

² Rule 2, sec. 4, Rules Supreme Court.

5, *infra*; rule 3, *infra*.

⁵ R. S., sec. 441.

³ O. Code, sec. 440.

petition in error will be dismissed, unless the court, on good cause shown, extend the time or dispense with such printing; and the fair expense of such printing will be taxed as part of the costs. The clerk delivers to the court, at each monthly call of the docket, a list of cases in default for record, which the court calls and makes such disposition thereof as is provided by statute.¹ A type-written record is not a sufficient compliance with the statute.² Where the printing is done under the supervision of the clerk, the matter to be printed should be indicated by a *precipe*.³ This is necessary because the clerk could not otherwise know how much of the record should be printed. In printing records economy may be practiced by observing the requirements of the statute and printing only so much of the record as will show the errors complained of. If the defendant in error is of the opinion that enough of the record is not printed, he may file a motion to require additional matters to be printed. The dismissal of a petition in error for want of a printed record is a bar to a second petition in error;⁴ and a dismissal of a case for want of record is equivalent to, and in substance is, an affirmation of the judgment of the lower court so far as the rights of the parties to the suit are concerned.⁵ The only recourse to be had when a case is dismissed is to file a motion to reinstate it, alleging such excuses as may exist, as sickness or other matters which might warrant the court in reinstating the case on the docket, and extending the time for printing the record. This course, however, receives very little encouragement. An administrator, executor, trustee or guardian prosecuting error may on application have the printing of the record dispensed with, when supported by an affidavit that the estate has no funds with which to pay for the printing.⁶

Sec. 1284. Relief after judgment in supreme court.—The provisions of the code as to new trial and relief after judgment⁷ apply to judgments or final orders by the supreme

¹ R. S., sec. 6711; Rules of Practice, 94; *Atcherly v. Dickinson*, 84 O. S. Rules 4 and 5. 537.

² *Hosterman v. Butler*, 24 W. L. B. 265. ³ *Cohen v. Cover*, 1 Toledo Legal News, 18, 19.

⁴ S. C. Rule 5.

⁵ 91 O. L. 335.

⁶ *Railroad Co. v. Belt*, 36 O. S. 93.

⁷ O. Code, secs. 5354-5365.

court.¹ Power is thereby conferred on the supreme court to vacate or modify its judgments after the term at which the same were rendered.² This power extends to judgments or orders of the supreme court commission as fully as to the judgments of the supreme court.³ Where, in a proceeding in error, to which an infant is a party defendant, the supreme court reverses a judgment that had been rendered in his favor, and the cause is remanded to the court where it had been rendered, with direction to render judgment against the infant in accordance with its rulings, which is done by such lower court, the judgment so rendered is the judgment of the court to which the cause was remanded. To take advantage of the provisions of the code to have a judgment vacated for error, the proceeding must be commenced in the court below where the judgment was in fact rendered.⁴

Sec. 1285. Rehearing in supreme court.—In many states a practice of allowing a rehearing of a case in the court of last resort prevails. But in Ohio it was held that the old act directing the mode of proceeding in chancery⁵ had no application to the old supreme court in bank,⁶ and also on a motion for rehearing, in *Longworth v. Sturges*,⁷ it was decided that it had no application to the present supreme court. It will be found that a distinction has been made between courts of original jurisdiction and those having appellate jurisdiction only; in the former rehearings have been allowed, and in the latter almost uniformly refused. The supreme court very early in *Longworth v. Sturges*, *supra*, adopted the doctrine laid down by the supreme court of the United States in *Brown v. Aspden*,⁸ in which it was decided that that court would not follow the rules of the English court of chancery in respect to rehearings, and that no re-argument would be granted in any case, unless a member of the court who concurred in the judgment desired it. The court uses this language in adopting that rule: "We do, therefore, adopt it, without assuming any infallibility for our judgments, because we believe, upon the whole, that the cause of justice will be promoted by it.

¹ O. Code, sec. 5365.

² O. Code, sec. 5354.

³ *Murphy v. Swadner*, 34 O. S. 674.

⁴ *Carey v. Kemper*, 45 O. S. 93. See

ante, secs. 1217, 1218.

⁵ Sec. 56, *Swan's Old Statutes*, 1841, p. 714.

⁶ *Carlile v. McDonald*, 7 O. 267.

⁷ 2 O. S. 104.

⁸ 14 How. 25.

There must be an end of litigation, not only for the benefit of the parties to each particular case, but to enable others standing behind them to have their rights determined. We do not intend in coming to this conclusion to deprive ourselves of the power of controlling our own journal during the term of court. If, therefore, any matter of fact has been overlooked in making a decision, it can be brought to our attention and any correction can be made. Much less do we intend to deny to this court the power possessed by all courts of setting aside judgments and decrees obtained by fraud, mistake or irregularity. What we do intend to deny is the right of the parties to compel us to re-investigate the merits of a controversy once determined, by the petition for rehearing, used in the English court of chancery and other courts of original jurisdiction."

In *Zink v. Grant*¹ it was held that there was no right to a rehearing after the decision of a cause by the supreme court, unless the application came within the provisions of the code of civil procedure as to relief after judgment,² and that the remedy was by a retrial of the case in the court below, or, if the case had been disposed of, by the commencement of a new suit.³

The question of rehearing indirectly arose in *Carey v. Kemper*,⁴ where a petition was filed to vacate or modify the judgment of the supreme court; it was a proceeding, however, to take advantage of the eighth paragraph of section 5354 of the code. The court said: "The practice of awarding rehearings has uniformly been confined to courts of original jurisdiction; they are not awarded as a matter of right in the appellate courts. The reason of this is not based upon any assumption of infallibility by such courts, but because, as stated by Ranney, J., in *Longworth v. Sturges*:⁵ 'There must at some time

¹ 26 O. S. 378.

² O. Code, secs. 5354 to 5365 inclusive, following *Longworth v. Sturges*, *supra*.

³ In *Corry v. Campbell*, 34 O. S. 204, it was said that the remedy by petition for rehearing, authorized by sec. 56 of the act of 1881, directing the mode of proceeding in chancery (Swan's Stat. 174), being inconsistent

with the code of civil procedure, was not saved by the sixth section of the act of March 14, 1853 (1 S. & C. 888), "to amend an act relating to the organization of courts of justice and their powers and duties," passed February 19, 1852.

⁴ 45 O. S. 94.

⁵ 2 O. S. 104.

be an end of litigation, not only for the benefit of the parties to each particular case, but to enable others standing behind them to have their rights determined.' Moreover, if the right to a rehearing were recognized as existing in the general practice of this court, the right must be regarded as having been exhausted by the motion that was made before the commission and overruled."

In *The Cleveland Rolling Mill Company v. Corrigan*,¹ a motion was made for a rehearing on the ground that the court had not passed upon certain questions raised and argued by counsel, which motion the court refused to entertain.

A rehearing may be had, however, if made at the request of one of the judges voting with the majority.² But as a general rule it is looked upon with disfavor. An application for a rehearing will not be entertained when made at a term subsequent to that at which the judgment is rendered, notwithstanding such rehearing is requested by one of the judges.* The supreme court has no power to rehear a cause decided by the supreme court commission on the ground that it was erroneously determined.³ Every court, however, in the exercise of its supervisory and protecting charge over its records and the papers belonging to its files, has the power to direct the clerk to correct not only clerical errors, but also such errors as may arise from any fraudulent or improper alteration or mutilation of its files or records; and in making such corrections it is not essential to the action of the court that it act on its own personal knowledge, but may hear evidence and act on the proof.⁴

Sec. 1286. Injunction — When granted by supreme court.

An injunction is a command to refrain from a particular act, and it may be the final judgment in an action, or may be allowed as a provisional remedy.⁵ When it is the final judgment or the very object of the suit, then it is the exercise of original jurisdiction, and the original jurisdiction conferred on the supreme court by the constitution⁶ is limited to *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*. When it is a temporary remedy during the pendency of a case on error or on appeal by the supreme court,⁷ it is the exercise

¹ 21 W. L. B. 184.

² Such was the case in *Commercial National Bank v. Wheelock*, 81 W. L. B. 208 (1894), the memorandum of the court being: "At the request of a member of the court who concurred in the judgment, a rehearing of this case is ordered."

³ *Maud v. Maud*, 84 O. S. 540.

⁴ *Hollister v. Judges*, 8 O. S. 201.

⁵ R. S., sec. 5571.

⁶ Art. 4, sec. 2.

⁷ As provided in section 5573 of the code.

* Rules of Practice, 8.

of appellate jurisdiction,¹ and is intended for the protection of the rights of the parties in a case under review on error, and therefore can be granted by the supreme court. But the power to grant an injunction in a cause pending in another court cannot, under the constitution, be conferred on the supreme court;² nor does it authorize a jurisdiction to be conferred upon or exercised by a judge of such court *at chambers*, which is clearly withheld from the court itself; consequently a judge of the supreme court, at chambers, cannot grant or dissolve an injunction in a cause pending in another court.³

Sec. 1287. Weight of evidence not considered.—By positive provision of the code, the supreme court is not required to determine the weight of the evidence in any civil case or proceeding, except when its jurisdiction is original.⁴ While it is well understood that the reviewing court will not consider the question whether a verdict or finding is against the weight of the evidence as shown by the bill of exceptions, it may examine the same to ascertain whether or not there was any evidence tending to support the same, as it then becomes a question of law.⁵ And so where clear and convincing proof is required, the court will look into the evidence to see whether the rule has been disregarded.⁶ A reviewing court will, in the absence of a bill of exceptions, presume any state of evidence consistent with the pleadings such as would justify the verdict given.⁷ Where the finding of a trial court, together with all the evidence upon which it is based, shown by a bill of exceptions, is before a reviewing court, and it appears that the facts found by the trial court do not embrace all the material facts disclosed by the bill, when exceptions have been duly entered to such finding, such reviewing

¹ Yeoman v. Lasley, 36 O. S. 416. See Kent v. Mahaffy, 2 O. S. 498; R. S., sec. 5573; Wagner v. Railway Co., 88 O. S. 40.

² Kent v. Mahaffey, 2 O. S. 498.

³ Railway Co. v. Hurd, 17 O. S. 144.

⁴ O. Code, sec. 6710.

⁵ House v. Elliott, 6 O. S. 497; Wil-
lenger v. Bramsche, 7 O. C. C. 208;
Seville v. Wagner, 46 O. S. 52; Ford
v. Osborne, 45 O. S. 8; Potter v. Pot-

ter, 27 O. S. 84; Shahan v. Swan, 48
O. S. 25. See Blair v. Burroughs, 23
W. L. B. 180, 203, 222; Ruel v. Incline
Ry. Co., 25 W. L. B. 282; Whalen v.
Railway Co., 24 W. L. B. 371; Sald-
heim v. Shane, 24 W. L. B. 428; Fin-
ley v. Whitley, 46 O. S. 524.

⁶ Ford v. Osborne, *supra*; Potter v.
Potter, *supra*.

⁷ Kitchen v. Loudenback, 48 O. S.
177.

court may determine the case from the whole record, including the facts found, and such additional facts as may be warranted by the whole evidence.¹

Sec. 1288. Assessing penalty.—Provision is made in the code authorizing the supreme and circuit courts to assess a penalty for groundless proceedings in error, or those prosecuted without reasonable cause. The supreme court, upon affirming a judgment of the circuit court, may tax as part of the costs a reasonable attorney's fee to the counsel of the defendant, as well as damages in such sum as may seem reasonable, excepting cases where the judgment of the circuit court directs payment of money, in which case it shall bear additional interest, at a rate not exceeding five per centum per annum, for the time it was stayed. But where the court certifies in its judgment that there was reasonable ground for the proceeding in error, no penalty shall be awarded.² The circuit court is authorized to render judgment against the plaintiff in error for five per centum upon the amount due the defendant in error, unless the court enter upon its minutes that there was reasonable ground for the proceeding in error.³ It is the duty of the court to assess a penalty unless it finds that there was reasonable ground for the proceedings in error.⁴

Sec. 1289. Staying execution of judgment.—The mere filing and pendency of a petition in error does not of itself suspend the execution of a judgment,⁵ but the same will be suspended only upon good ground therefor being shown;⁶ and the filing of a written undertaking to the adverse party,⁷ except when error is prosecuted by executors, administrators or guardians, who have given bond in their representative capacity, are not required to enter into an additional undertaking.⁸ Where the judgment directs the payment of money, the undertaking must be in double the amount of the judgment and costs;⁹ and where a money judgment,

¹ *Sturgeon v. Hull*, 8 O. C. C. 269 O. S. 515; *Steube v. State*, 3 O. C. C. (1894). See *Levi v. Daniels*, 22 O. S. 888.

38.

⁵ *Building Ass'n v. Insurance Co.*,

² O. Code, sec. 6730.

84 O. S. 291.

³ O. Code, sec. 6730.

⁷ O. Code, sec. 6718.

⁴ *Brady v. Holderman*, 19 O. 26.

⁸ O. Code, sec. 6721.

⁶ *State ex rel. v. Commissioners*, 14

⁹ O. Code, sec. 6718, subd. 1.

rendered in the court of common pleas, is affirmed by the circuit court, the defendant is entitled, upon filing a petition in error in the supreme court, to have the same stayed upon filing the proper bond in the circuit court. The amount of the bond in such case cannot be fixed by the supreme court.¹ When the judgment directs the execution of a conveyance or other instrument, the undertaking must be in such sum as may be prescribed by a court of record or a judge thereof.² And so where it directs the sale or delivery of possession of real property, the bond may be fixed by a court of record or a judge thereof.³ In this case the court of common pleas may fix the bond while the case is pending in the supreme court,⁴ and the conditions thereof must be that waste shall not be committed, and that if the judgment be affirmed the value of the use and occupation of the premises shall be paid, and not as in the case of a money judgment.⁵ When the judgment directs the assignment or delivery of documents, they may be placed in the custody of the clerk of the court in which the judgment was rendered to abide the judgment rendered on error.⁶ A judgment or final order made by a justice of the peace is stayed by the filing of an undertaking to the defendant with the clerk of the court of common pleas. When it directs the delivery of possession of real property, the amount of the bond shall be prescribed by the court of common pleas or a judge thereof, or in his absence by the probate court.⁷ In all other cases the execution of a judgment or final order of any tribunal, or the levy or collection of any tax or assessment, may be prescribed by the court in which the petition in error is filed or by a judge thereof.⁸ Where a judgment has been reversed by the circuit court, the plaintiff in error in the supreme court shall apply to the court to which the cause has been remanded for further proceedings for a continuance of the case until the final determination in the supreme court.⁹

¹ Hyde v. Bank, 49 O. S. 60.

² O. Code, sec. 6718.

³ O. Code, sec. 6718.

⁴ Gurney v. Same, 88 O. S. 658.

⁵ O. Code, sec. 6718, subd. 3; Bear v. Bookmiller, 8 O. C. C. 484.

⁶ O. Code, secs. 6718, subd. 4, 6720.

⁷ O. Code, sec. 6724.

⁸ O. Code, sec. 6725. When execution is stayed by order of the supreme court, the undertaking must be filed with the clerk of the trial court.

⁹ Neubert v. Phillips, 46 O. S. 559; Schaeffer v. Marienthal, 17 O. S. 183. In Building Ass'n v. Insurance Co., 34 O. S. 291, it was held that the execu-

Sec. 1290. Dismissal of cases and reinstatement in supreme court.— When the plaintiff in error fails to file a printed record within the required time the cause shall be dismissed.¹ And so where a cause is reached for decision, that is, when it is within the call, in which the plaintiff in error has failed to file printed briefs, it will also be dismissed, remanded or otherwise disposed of, at the discretion of the court.² Causes dismissed for failure to file printed record or argument, in exceptional cases may be reinstated upon a motion filed for that purpose. In presenting such motions the plaintiff in error is required not only to furnish good and sufficient cause for reinstatement, but must also show that there is reasonable ground for prosecution of the proceedings in error. He should go into the merits of the case as upon a motion for leave to file a petition in error. The dismissal by the supreme court commission for want of preparation as required by rule, and a motion subsequently made before it for reinstatement, is final.³

Sec. 1291. Judgment rendered on error.— When a judgment or order made by a justice of the peace is reversed by the court of common pleas, the cause is there retained for trial and final judgment, as in cases of appeal,⁴ excepting where the reversal is because the justice had no jurisdiction of the plaintiff in error or of the subject of the action.⁵ When a judgment is reversed in whole or in part in the common pleas, circuit or supreme court, the court reversing the same may render the judgment which the court below should have rendered, or remand the cause to the court below for such judgment.⁶ Where a judgment is reversed on error for the reason

of an order remanding a cause for further proceedings upon a reversal of a judgment may be stayed by the court in which the petition in error is filed.

¹ *Ante*, sec. 1288.

² S. C. Rule 2, sec. 8.

³ *Atcherly v. Dickinson*, 34 O. S. 537.

⁴ *Robinson v. Kiowa*, 4 O. S. 594; O. Code, sec. 6733.

⁵ O. Code, sec. 6733; *Adams Express Co. v. St. John*, 17 O. S. 641.

⁶ O. Code, sec. 6726. The reviewing

court may reverse and render the proper decree before it on the facts as shown by the bill of exceptions. *Yeoman v. Lasley*, 40 O. S. 339. Where the requisite data appears on the face of the record the supreme court may render the judgment which the court below should have rendered. *Railroad Co. v. Simpson*, 5 O. S. 251. But the duty of enforcing such judgment is imposed upon the lower court. *Hulett v. Fairbanks*, 41 O. S. 401. The reviewing court has inherent power to make an order

that the court overruled a motion for a new trial, predicated upon the ground that the verdict was contrary to the evidence, the proper judgment would be to set the verdict aside and remand the cause for a new trial.¹ The court below may take the case up at the point where the error was first committed.² A judgment of reversal takes effect as of the date of the commencement of the proceedings in error.³ The reviewing court, upon reversing or affirming a judgment or final order, shall not issue execution, but must send a special mandate to the court below, as the case may require, for execution thereon, and the court to which such special mandate is sent shall proceed in the same manner as if such judgment or final order had been rendered therein;⁴ and an authenticated mandate cannot be impeached in the lower court, but the proper remedy is to seek redress in the reviewing court.⁵

Sec. 1292. Journal entry reversing judgment of justice.

This cause came on to be heard upon the petition in error and the transcript of the record containing the final judgment sought to be reversed and was argued by counsel; on consideration whereof the judgment of the said justice of the peace in refusing to discharge the attachment is reversed, and said attachment is hereby discharged. It is therefore considered that said plaintiff in error recover of said defendant in error his costs herein.

Ordered, that a copy of this entry be certified to the said justice of the peace.

Sec. 1293. Journal entry of affirmance in circuit court.

The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said plaintiff in error herein, together with the original papers and pleadings, and a duly certified transcript of the orders and judgment of the court of common pleas of — county, Ohio, filed herein in said action, wherein R. K. was plaintiff and the — Company was defendant, mentioned and referred to in said petition in error, and was argued by counsel. Upon consideration whereof the court find that there is no error mani-

of restitution. *Hiler v. Hiler*, 85 O. S. 645; *Bickett v. Garner*, 81 O. S. 468.
28; *Neil v. Neil*, 88 O. S. 558.

¹ *Gay v. Davey*, 47 O. S. 896; *Stivers v. Borden*, 20 O. S. 282. See, also,

Emery v. Bank, 25 O. S. 360; *Miller*

v. Sullivan, 26 O. S. 639.

² *Commissioners v. Carey*, 1 O. S.

468.

³ *Lloyd v. Moore*, 88 O. S. 96. *Cf.*

Rupp v. Phillips, 1 O. C. C. 108-11.

⁴ O. Code, sec. 6726.

⁵ *Stevenson v. Morris*, 37 O. S. 10.

fest upon the face of the record in said orders and judgment of said court of common pleas.

It is thereupon considered, ordered and adjudged by this court that the judgment and proceedings of the said court of common pleas in said action in favor of said defendant in error be and the same are hereby in all things affirmed; there being, however, in the opinion of the court, reasonable ground for this proceeding in error, no penalty is attached.

It is further considered and ordered that the plaintiff in error pay the costs of this proceeding in error, taxed at \$—, and in default thereof that execution issue therefor. To which judgment and decision of the court in affirming the decision of the common pleas court, and in rendering judgment for costs herein, the said plaintiff in error at the time excepted.

Ordered, that a special mandate be sent to the court of common pleas of — county to carry this judgment into execution.

Sec. 1294. Journal entry of reversal in circuit court.—

This day came the parties by their attorneys, and this cause having been on a former day of this term heard and submitted and taken under advisement by the court, on consideration thereof the court find that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the plaintiffs in error in this, to wit: In admitting evidence in chief of plaintiff as to reputation and character of plaintiff below.

It is therefore considered, ordered and adjudged by this court that the judgment and proceedings of said court of common pleas be and the same hereby are set aside, reversed and held for naught, and that said plaintiffs in error be restored to all things which they have lost by reason of said judgment.

That said action be, and it hereby is, remanded to said court of common pleas of — county, Ohio, to be proceeded in according to law and the rights of said parties.

That said defendant in error pay the costs of this proceeding in error to be taxed, and in default thereof that an execution issue therefor; and

That a special mandate be sent to said court of common pleas to carry this judgment and order for costs into execution. To all which rulings, orders and judgment of the court the said defendant in error by his counsel then and there excepted and now excepts.

Sec. 1295. Speedy justice.—There is a statutory requirement that when a cause is submitted on error the same must be determined and adjudicated within ninety days after its submission; but this does not interfere with the rules of the supreme court.¹

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